Supreme Court, U.S.
FILED
97 2053 JUN 15 1998
OFFICE OF THE CLERK

(1)

Nº. _____

In The

Supreme Court of The United States

October Term 1997

In re: HERBERT HERMAN WEISBERG and DELPHINE RUTH WEISBERG,

Debtors.

EDWARD M. WOLKOWITZ, Trustee, and DAVID R. WEINSTEIN

Petitioners,

v.

SHEARSON LEHMAN BROTHERS, INC.,

Respondent.

Petition For A Writ Of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID R. WEINSTEIN*
ALEXANDRA PELKAN
Weinstein, Eisen & Levine
1925 Century Park East, Suite 1150
Los Angeles, California 90067-2712
(310) 203-9393
**Counsel of Record*

APPELLATE ADVANTAGE
4264 N. OAK TRAFFICWAY◆KANSAS CITY, MO 64116◆816-453-2424

103 pp

I.

QUESTIONS PRESENTED FOR REVIEW

1. In this matter of first impression, were the definitions assigned by the Ninth Circuit for the terms included in 11 U.S.C. § 362(b)(6) so demonstrably more expansive than intended by Congress and contrary to established interpretations of other sections and sub-sections of the Bankruptcy Code such that its decision results in problematic anomalies for Bankruptcy Courts, warranting reversal?

2. Does Federal Rule of Bankruptcy Procedure 9011 authorize sanctions against counsel for a Bankruptcy Trustee for commencing an action over a matter that is one of first impression and the facts of the case do not squarely comport with the language of the controlling statute?

II.
LIST OF PARTIES TO THE PROCEEDING

1. Petitioner (previous Appellant), Edward M. Wolkowitz, Chapter 7 trustee for the Bankruptcy Estate of Herbert Herman Weisberg and Delphine Ruth Weisberg.

2. Petitioner (previous Appellant), David R. Weinstein, Esq., general bankruptcy counsel to the Chapter 7 trustee.

3. Respondent (previous Appellee), Shearson Lehman Brothers, Inc.

III.
TABLE OF CONTENTS

Questions Presented for Review i
List of all Parties ii
Table of Contents iii
Table of Authorities iv
Opinions Below viii
Jurisdiction ix
Statutes Involved x
Statement of the Case 1
Argument 6
Conclusion 21
Appendices
- Appendix A 1
- Appendix B 54
- Appendix C 61

IV.
TABLE OF AUTHORITIES

Judicial Decisions

Bryan v. Merrill Lynch, Pierce,
Fenner & Smith, Inc. 565 F.2d
276, 277-78 (4th Cir. 1977) *cert. denied,*
435 U.S. 943 (1978) 12

Carpenters Health and Welfare
Trust Funds for California v.
Robertson (In re Rufener Construction, Inc.)
53 F.3d 1064, 1068 (9th Cir. 1995) 19

Cooter & Gell v. Hartmarx Corporation,
496 U.S. 384, 393,
110 S.Ct. 2447, 2454 (1990) 17

Farrell v. Wurm (In re Donnay),
184 B.R. 767, 787 (Bankr.D.Minn. 1995) 14

Geiger v. Pennsylvania (In re Geiger),
143 B.R. 30, 33 (E.D.Pa. 1992), aff'd.,
993 F.2d 224 (3rd Cir. 1993) 13

In re Drexel Burnham Lambert Group, Inc.,
113 B.R. 830, 853 (Bankr.S.D.N.Y. 1990) 13

In re National Gypsum,
139 B.R. 397, 405 (N.D. Tex. 1992) 13

In re Weisberg,
193 B.R.916 (B.A.P. 9th Cir. 1996) ..... viii, 10

Marky v. Norstar Bank, National Association
(In re Tremont Corp.,), 143 B.R. 989, 990-91
(Bankr. W.D.N.Y. 1992) 18

Public Finance Corp. v. Freeman,
712 F.2d 219, 222 (5th Cir. 1983) 19

School District No. 1J, Multnomah
County, Oregon v. AC and S, Inc.,
5F.3d 1255, 1263 (9th Cir. 1993),
cert denied, 512 U.S. 1236 (1994) 16

United Savings Association of Texas v.
Timbers of Inwood Forest Associates, Ltd.,
484 U.S. 365, 108 S.Ct. 626 12

Wolf v. Kupetz (In re Wolf & Vine, Inc.),
118 B.R. 761,769 (Bankr.C.D.Cal. 199) 19

Wolkowitz v. Shearson Lehman Brothers, Inc.
(In re Weisberg)
136 F.3d 655 (9th Cir. 1998) viii,12,13, 14

Statutory Provisions

11 U.S.C. § 101 ..... x, 1, 7, 13, 14

11 U.S.C. § 158 1

11 U.S.C. § 326 x

11 U.S.C. § 330 ..... x, 17

11 U.S.C. § 362(a) ..... *passim*

11 U.S.C. § 362(b)(6) ..... *passim*

11 U.S.C. § 704 ..... x, 17, 18

11 U.S.C. § 741(7) ..... x, 7, 9

11 U.S.C. § 761(15) 7

28 U.S.C. § 1254(1) ix

Fed.R.Bankr.P. 9011 ..... *passim*

Fed.R.Bankr.P. 9023 ..... x, 5, 15, 16

Fed.R.Civ.P. 11 17

Fed.R.Civ.P. 59 ..... x, 16

H.R.Rep.No. 95-595
at 340, 95th Cong., 1st Sess.(1977) 8

H.R. 4935 at 1,
97th Cong., 2nd Sess. (1982) 8

V.
OPINIONS BELOW

1. *Wolkowitz v. Shearson Lehman Brothers, Inc. (In re Weisberg)*, 136 F.3d 655 (9th Cir. 1998).
2. *In re Weisberg*, 193 B.R. 916 (B.A.P. 9th Cir. 1996).

VI.
BASIS FOR JURISDICTION

The Ninth Circuit Court of Appeals issued the opinion from which the Petitioners appeal on February 17, 1998. The Petitioners filed a motion for rehearing which was denied on March 17, 1998. This Court has jurisdiction based on 28 U.S.C. §1254(1).

VII.
STATUTES INVOLVED IN THE CASE

(Full text provided in the appendix)

1. 11 U.S.C. § 101(5)
2. 11 U.S.C. § 326
3. 11 U.S.C. § 330
4. 11 U.S.C. § 362(a)
5. 11 U.S.C. § 362(b)(6)
6. 11 U.S.C. § 704
7. 11 U.S.C. § 741(7)
8. Fed.R.Bankr.P. 9011
9. Fed.R.Bankr.P. 9023
10. Fed.R.Civ.P. 59

VIII.
STATEMENT OF CASE

A. Introduction:

On Petition for Certiorari is a decision from the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit"). The Ninth Circuit heard the case on appeal from the United States Bankruptcy Appellate Panel of the Ninth Circuit (the "BAP"), basing its jurisdiction on 11 U.S.C. § 158(d). The BAP had jurisdiction over the appeal from the United States Bankruptcy Court for the Central District of California (the "Bankruptcy Court") pursuant to 11 U.S.C. § 158(b).

The crux of this appeal is the lower courts' interpretation of 11 U.S.C. § 362(b)(6) ("§ 362(b)(6)").[1] Section 362(b)(6) provides that the automatic stay effectuated by 11 U.S.C. § 362(a) upon the filing of a bankruptcy petition does not stay the setoff by a stockbroker of a claim against the debtor for a margin payment arising out of a securities contract. **The correct interpretation and application of § 362(b)(6) is a matter of first impression for this Court.** Given the recent dramatic increases in the number of bankruptcy filings and record-breaking stock market activity, § 362(b)(6) promises to become an increasingly important

---

[1]Unless otherwise noted, all statutory references herein are to the Bankruptcy Code, 11 U.S.C. § 101, et seq.

exception to the automatic stay. Individuals with brokerage accounts filing bankruptcy is inevitable, and due to the volatility of the market, post-petition margin calls will be made. However, the limits of the exception provided by § 362(b)(6) are unclear. **The plain meaning of the section would limit the protection to the setoff of a claim against the debtor for a margin payment or settlement payment as those terms are defined elsewhere within the Bankruptcy Code.** However, the Ninth Circuit has defined the terms within the section to protect any foreclosure of stock held as collateral, even for simple loans made by brokers.

The core issue boils down to the extent of protections granted by § 362(b)(6) to stock brokers and those granted to debtors. The Ninth Circuit has upset the delicate balance created by Congress, giving brokers free reign, in the name of whatever the broker decides to title a "margin account," to foreclose on property of a bankruptcy estate, thereby rewarding itself with preferential payments to the detriment of the other creditors of the estate. By addressing the meaning and application of § 362(b)(6) at the present time, this Court will significantly increase judicial efficiency by delineating the boundaries and proper application of the section, thereby ensuring that the delicate balance of interests between brokers and bankruptcy estates is maintained. Given the headline busting stock market and increased bankruptcy filings, the optimum time to clarify the definitions within §

362(b)(6) is now, as other lower courts are grappling with the question of whether particular "margin calls" have violated the automatic stay.

Petitioners also call upon this Court to decide whether Federal Rule of Bankruptcy Procedure 9011 ("Rule 9011") embraces the imposition of sanctions in matters of first impression where the facts of the case are not completely on point with the language of the controlling statute. Sanctions, or even the threat of sanctions, in such a scenario would quash creative legal thinking and impair attorneys' ability to fully and expertly represent their clients and Petitioners do not believe Rule 9011 (or its Federal civil counterpart, Federal Rule of Civil Procedure 11) was designed to sanction lawyers who find themselves on the wrong side of questions of first impression.

B. Facts:

The specific issues in this case revolve around post-bankruptcy petition actions taken by Shearson Lehman Brothers, Inc., ("Shearson") to sell off stock that was undeniably part of the bankruptcy estate, to pay itself on a loan owed by Herbert and Delphine Weisberg ("Debtors"). Pre-petition, the Debtors opened a customer account with Shearson pursuant to a multi-purpose, non-specific "Client Agreement" (the "Customer Account"). The Debtors deposited shares of publicly traded stock of City National Bank (the "Stock") into the Customer Account prior to

October 8, 1990. After that date, the Debtors borrowed $50,000 from Shearson for purposes other than to purchase stock, using the existing Stock as collateral (the "Loan"). **The Client Agreement referred to such transactions for purposes "other than purchasing, carrying or trading in securities" as "Express Credit Loans", distinct from "Margin Loans" which were for the "purpose of purchasing, carrying or trading in securities."**

The Stock became property of the bankruptcy estate upon the filing of the petition. Over a period of several months after the bankruptcy was filed, as the market price of the Stock declined, Shearson issued a series of "margin calls" to the Debtors. When no response was received, Shearson sold the Stock to pay itself on the Debtors' pre-petition loan.

Later, a bankruptcy trustee was appointed over the Weisbergs' estate. Upon learning of the sale of the Stock by Shearson, Edward Wolkowitz, the Chapter 7 trustee and petitioner herein (the "Trustee") filed a complaint against Shearson alleging a violation of the Automatic Stay provided by 11 U.S.C. § 362 and the right to recover the post-petition transfers (the "Complaint"). The Bankruptcy Court for the Central District of California ruled that § 362(b)(6) excepted the foreclosure sale by Shearson from the automatic stay of § 362(a). In making that ruling, the Bankruptcy Court, and later the BAP and the Ninth Circuit which both affirmed, necessarily assumed that Shearson also owed the Debtors a pre-bankruptcy debt that could be set off against the loan.

Further, the lower courts mischaracterized the transactions in question as involving a "securities contract" and "margin payments" for § 362(b)(6) purposes.

So certain was the Bankruptcy Court that § 362(b)(6) clearly exempted the sales from the automatic stay that it announced its unequivocal intent to sanction the trustee's counsel for bringing a frivolous suit. After the Bankruptcy Court said it would impose $11,342.45 in sanctions, the parties negotiated over a settlement regarding the amount and payment of the sanctions (the "Settlement"). Limited portions of the Settlement were read into the record before the Bankruptcy Court, and the *Order Granting Shearson's Motion for Summary Judgement and Denying Trustee's Cross-Motion for Summary Judgment* (the "Summary Judgment Order") noted that Shearson's request for sanctions had been resolved by negotiation. No mention was made about the appealability or non-appealability of the sanctions, and disputes shortly arose over this issue. These disputes became focused when Shearson cashed a check specially endorsed with the legend that doing so would acknowledge appealability of the sanctions thus paid.

Thereafter, the Trustee brought a motion under Federal Rule of Bankruptcy Procedure 9023 to clarify the Summary Judgment Order and eliminate any questions concerning the appealability of the sanctions (the "Motion to Amend"). The Motion to Amend was denied and the Bankruptcy Court imposed further sanctions, describing the

motion as frivolous.

Petitioners appealed both the Summary Judgment Order and the order denying the Motion to Amend. While the BAP affirmed the Bankruptcy Court's rulings, the Ninth Circuit reversed on the issue of the further sanctions, finding that the Motion to Amend was not frivolous. The Ninth Circuit otherwise affirmed the BAP and Bankruptcy Court.[2]

IX.
ARGUMENT

A. The Ninth Circuit Interpreted Section 362(b)(6) More Expansively than Congress Intended and Contrary to Established Interpretations of Other Sections of the Bankruptcy Code.

Section 362(b)(6) is not a blanket exception enabling brokers to do as they please. The terms within the section have precise definitions which render the section inapplicable to the facts in this case. The meanings applied by the Ninth Circuit are so much broader than Congress intended and are so inconsistent with the interpretations given to the same terms in other sections of the Bankruptcy Code that they

---

[2]The Ninth Circuit did not rule on the merits of the Motion to Amend in its initial judgment, entered February 17, 1998. The omission was brought to the attention of the Ninth Circuit in a Motion for Rehearing which was denied March 17, 1998. The matter remains unanswered and unresolved.

threaten to wreak havoc. Because of the recent proliferation of both bankruptcies and individuals' investments in publicly traded securities, it is imperative that the terms of § 362(b)(6) be clearly delineated.

Section 362(b)(6) provides that the automatic stay of § 362(a) does not stay

> the setoff by a . . . stockbroker . . . of any mutual debt and claim under or in connection with . . . securities contracts as defined in § 741(7) of this title that constitutes a setoff of a claim against the debtor for a margin payment as defined in section 101(34), 741(5) or 761(15) . . . .

(emphasis added).

Congress' intent in enacting § 362 was to balance the interests of particular creditors with the interests of debtors and of the general creditor body. The automatic stay of §362 (a)

> gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's

> property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

H.R. Rep. No. 95-595, at 340, 95th Cong., 1st Sess. (1977).

Subsection 362(b)(6) was enacted in 1982 as part of the bill entitled "Technical and Substantive Changes in Bankruptcy With Respect to Securities and Commodities." The purpose of the bill was to provide protections in the event of a "major bankruptcy" affecting the commodities and securities market. H.R. 4935, at 1, 97th Cong., 2nd Sess. (1982). "Because of the structure of the clearing systems in these industries and the sometimes volatile nature of the markets, certain protections are necessary to prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market." *Id.* As part of the protections granted to commodities and stock brokers, § 362(b)(6) was enacted to allow brokerage firms, forward contract merchants, and commodity or securities clearing agencies to set off a claim for a margin payment against cash or securities being held with respect to securities contracts. The statute was not designed to protect a straightforward foreclosure made on the

collateral of a simple loan.

An exception to the automatic stay under § 362(b)(6) requires (1) a securities contract; (2) a margin payment; (3) a mutual debt and claim as of the date of the petition; and (4) a setoff. Each of these terms is defined in the Bankruptcy Code or in case authority to limit the application of § 362(b)(6) to specific transactions. Although the Ninth Circuit expanded the meanings of the terms within § 362(b)(6) to allow its application here, the definitions provided within the Bankruptcy Code and case authority indicate that the simple loan transaction underlying this case did not give rise to any of the four requirements of § 362(b)(6).

1. The Loan was Not a "Securities Contract" as Defined by the Bankruptcy Code.

Section 362(b)(6) limits "securities contracts" to those as defined under 11 U.S.C. § 741(7) ("§ 741(7)"). That section defines "securities contract" as a contract "for the purchase, sale, or loan of a security." None of these actions occurred here. The "Client Agreement" did not propose the "purchase, sale or loan" of the particular Stock in the Customer Account. The Debtors owned the Stock before they placed it in the Customer Account The Debtors did not purchase or sell the Stock pursuant to the Client Agreement, nor was the Stock loaned to them. In fact, the Debtors did not purchase or sell any stock pursuant to the Client Agreement. By the plain meaning of "purchase, sale or loan", no

"Securities Contract" existed here.

In order to reach its erroneous conclusion that a "securities contract" existed, the BAP had to go beyond the Bankruptcy Code to authorities regarding securities law.[3] The BAP cited authority to the effect that a "pledge of security to secure a margin brokerage account constituted a 'purchase and sale' for the purpose of section 10(b) and Rule 10b-5." 193 B.R. 924. In reaching this conclusion, the BAP assumed that a "margin brokerage account" existed.[4] However, no margin brokerage account existed here.

Margin accounts are used to permit

> the customer to purchase stock or securities by the payment of an agreed percentage of the purchase price, leaving the stock as collateral for the balance due; on this balance, the broker charges interest. An important part of the agreement establishing such an account is the promise of the customer, in the event the stock purchased declines in value, to make additional payments or to furnish other acceptable collateral in order to maintain an

---

[3]The Ninth Circuit deferred to the BAP's decision on the issue of whether a "securities contract" existed.

[4]The BAP ignored the fact that the record showed that not one single security was purchased or sold by the Debtors pursuant to the Client Agreement.

> agreed margin of protection against loss by the broker. When a decline in value of the stock purchased reaches the point that additional payments or collateral may be required, the broker makes what is known as a "margin," or "maintenance," call on the customer. Should the customer fail to meet such call, the broker may sell the stock in the account for his protection.

Bryan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 565 F.2d 276, 277-78 (4th Cir. 1977), *cert. denied*, 435 U.S. 943 (1978).

Here, the Loan was not made for the purchase of the City National Bank Stock deposited in the "margin" account. The Loan was made for unspecified reasons - not necessarily to purchase stock. Thus, there was no "pledge of security to secure a margin brokerage account" as assumed by the BAP.

In order to reach their conclusions, the BAP and Ninth Circuit completely departed from the Bankruptcy Code and mischaracterized the facts herein. Their erroneous conclusions make bad precedent, which will have serious repercussions, given the likelihood of substantial use of § 362(b)(6) in the near future.

2. No "Margin Payment" was Owed By the Debtors.

Margin calls are made "in the event the stock purchased declines in value." *Bryan*, 565 F.2d at 277. At that time, a margin payment is due. *Id.* at 278.

As noted above, the Loan in this case was not made to purchase stock, and the Debtors owned the Stock in the Customer Account prior to its deposit therein. Since no stock was purchased, there was no "event" of the "stock purchased declin[ing] in value." Therefore, Shearson's demand for payment or more collateral was not a "margin call," and no "margin payment" was due.[5]

3. No Mutual Debt and Claim Existed Between Shearson and the Debtors.

The Ninth Circuit affirmed the BAP's ruling that the Client Agreement imposed obligations upon Shearson that gave rise to a potential claim against Shearson, even if such obligation was unmatured at the time of the petition. 136 F.3d

---

[5]Shearson's "margin call" was actually a simple demand by a creditor for payment, a payment much like the "adequate protection" payment this Court proscribed in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 108 S.Ct. 626 (1988). Shearson, like all the Debtors' other creditors, was stayed from making such a demand, and by making it anyway, violated section 362(a).

at 658.[6] "Claim" is defined by 11 U.S.C. § 101(5). Apdx C - 61. While its scope is broad, it is not without limits. Only relationships which give rise to a legal obligation for payment of money create "claims." *In re National Gypsum*, 139 B.R. 397, 405 (N.D. Tex. 1992). Purely equitable rights are not claims, nor does the mere existence of a simple legal relationship create a "claim".

> [I]t does not follow that there is an "enforceable obligation" or "legal obligation" within the meaning of section 101(5) merely because a [party] might ultimately be required to make a payment . . . to obtain a particular service or privilege.

Geiger v. Pennsylvania (In re Geiger), 143 B.R. 30, 33 (E.D.Pa 1992), *aff'd.*, 993 F.2d 224 (3rd Cir. 1993).

The Client Agreement between Shearson and the Debtors only created liability for Shearson in the event of an improper and unanticipated act by Shearson. No such liability by Shearson was incurred prior to the petition, and even if Shearson had violated the Client Agreement, for example by wasting the collateral or withholding the surplus, a creditor cannot use a wrongful act to create a debt for setoff purposes *In re Drexel Burnham Lambert Group, Inc.*, 113 B.R. 830, 853 (Bankr. S.D N.Y. 1990). Because the Client Agreement only imposed equitable obligations on Shearson

---

[6]The Ninth Circuit found that the Client Agreement obligated Shearson "to deal with the debt and the collateral in accordance with its terms." 136 F.3d at 658.

in the event of improper acts by Shearson, no "claim" within the meaning of § 101(5) existed, and § 362(b)(6)'s exception to the automatic stay did not apply to Shearson.

The Ninth Circuit's liberal definition of "claim" leads to anomalous results. The finding that the Client Agreement imposed an obligation upon Shearson giving rise to a potential claim against Shearson, even though the obligation was unmatured at the time of the petition means that secured creditors bear a legally cognizable debt to their borrowers, merely by participating in a lending relationship and obtaining collateral for a loan. Lenders now have an obligation "to deal with the debt and the collateral in accordance with [security agreements]." 136 F.3d at 658. In effect, the ruling means that mortgagors now owe an obligation to mortgagees. The Trustee submits that this is not the law and will be startling news to the financial services industry and those who audit their financial statements.

4. Shearson's Sale of the Stock Was Not a Setoff.

The setoff of debts under the Code requires mutual obligations arising either prepetition or post petition. "Mutuality requires that something be 'owed' by both sides." *Farrell v. Wurm (In re Donnay)*, 184 B.R. 767, 787 (Bankr. D. Minn. 1995). Because the Debtors had no "claim" against Shearson, no mutual debts existed, and setoff was not possible. Therefore, Shearson's sale of the stock was a

straightforward foreclosure of collateral and was unprotected by § 362(b)(6)'s exception to the automatic stay.

The Ninth Circuit defined "securities contract," "margin payment," "claim" and "offset" in manners which went beyond both the terms' plain meanings and prior judicial interpretations. The Ninth Circuit's definitions upset the delicate balance between the treatment of debtors and creditors under the Bankruptcy Code. Further, the result reached by the Ninth Circuit gives unfair preference to brokers over other creditors. The decision establishes bad precedent, at a time when the statute at issue, § 362(b)(6), is becoming increasingly important. Given the current upsurge of both the stock market and bankruptcy filings, and the inevitable overlap of investors and debtors, it is imperative that the Ninth Circuit's improvident ruling be overturned.

B. A Manifest Injustice Would Occur If the Summary Judgment Order is Not Amended to Allow the Appeal of the Sanctions.

In granting summary judgment to Shearson, the Bankruptcy Court announced its unequivocal intent to sanction the Trustee and his counsel for having filed a frivolous complaint. The order did not specifically so provide, but the petitioners were left in the position of having to pay sanctions anyway via the Settlement. The Trustee attempted to amend the Summary Judgment Order pursuant to Federal Rule of Bankruptcy Procedure 9023 to enable the

appeal of the sanctions, and was denied.

Under Federal Rule of Civil Procedure 59, as made applicable herein by Federal Rule of Bankruptcy Procedure 9023, a judgment may be amended if (1) the court is presented with newly discovered evidence; (2) the court committed clear error or the decision was *manifestly unjust*; or (3) if there was an intervening change in the controlling law. *School District No. 1J, Multnomah County, Oregon v. AC and S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994).

Sanctions are manifestly unjust where, as here, the matter is one of first impression, the facts lend themselves to a colorable argument, and the complaint was filed in good faith. As described above, no "security contract", "margin payment", "claim" or "setoff" for § 362(b)(6) purposes as defined by the Bankruptcy Code existed here. But even if this Court were to find that the facts herein did fall within the realm of § 362(b)(6), given that the Client Account in this case was not a traditional margin account, the Trustee cannot be faulted for making a good faith effort to distinguish his case from § 362(b)(6). Because § 362(b)(6) did not apply, or at least a colorable argument could be made that it did not apply, the sanctions effectively imposed by the Bankruptcy Court were manifestly unjust warranting a reversal of the order denying the Motion to Amend to allow the Trustee to appeal the sanctions and seek their elimination.

It is imperative that this Court grant certiorari to hear

the appeal of the order denying the Motion to Amend because, by acknowledging the sanctions yet not ruling upon them, the Ninth Circuit has effectively condoned sanctions in matters of first impression. Such a result will chill creative legal representation. As this Court noted in *Cooter & Gell v. Hartmax Corporation*, 496 U.S. 384, 393, 110 S.Ct. 2447, 2454 (1990),

> the central purpose of Rule 11 is to deter baseless filings in district court and thus, consistent with the Rules Enabling Act's grant of authority, streamline the administration and procedure of the federal courts. . . . Although the Rule must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy, . . . any interpretation must give effect to the Rule's central goal of deterrence.

The Petitioners submit that the Bankruptcy Court's effective imposition of sanctions was not necessary to deter frivolous and vexatious litigation, and instead chills vigorous advocacy and the vigorous efforts of bankruptcy trustees to carry out their statutory duties.

Bankruptcy trustees and their counsel are not vexatious litigants who need deterrence. Their fees are subject to court approval, and it they waste time and money pursuing frivolous actions the court will deny their fee applications. *See*, 11 U.S.C. §§ 326, 330. However, trustees

have a statutory duty imposed by the Bankruptcy Code to maximize bankruptcy estates for the ultimate benefit of creditors. 11 U.S.C. § 704. Given their statutory duty, trustees should not be penalized for pursuing legitimate arguments which ultimately fail. Courts should accord bankruptcy trustees special consideration before imposing sanctions.

> To sanction [trustees] for vigorously trying to [pursue their statutory duty] would run counter to the responsibility placed on them by Congress. . . . In fact, had the [trustee] refrained from pursuing [his] legal remedies in this case, it might well have been argued that [he] failed properly to perform [his] obligations. Before imposing sanctions on trust funds, Trustees, or their counsel, Courts must consider the implications of the fiduciary duties and obligations placed on those entities and weigh that factor carefully in reaching their judgments.

Marky v. Norstar Bank, National Association (In re Tremont Corp.), 143 B.R. 989, 990-91 (Bankr. W.D.N.Y. 1992), *citing*, *Operating Engineers Pension Trust v. A-C Company*, 859 F.2d 1336, 1344 (9th Cir. 1988).

The Bankruptcy Court's effective imposition of sanctions punished the Trustee and his counsel for making what was, given the facts as related herein, at least a colorable

argument in a matter of first impression. The Ninth Circuit's acknowledgment of the sanctions and refusal to address them leaves the impression that sanctions upon a trustee and his counsel can be imposed without any consideration for their statutory responsibilities or for whether the matter was one of first impression.

Sanctions are inappropriate in matters of first impression where a colorable claim is presented in good faith. *Public Finance Corp. v. Freeman*, 712 F.2d 219, 222 (5th Cir. 1983) ("[I]t is error as a matter of law to suggest that one who poses an as yet unanswered legal question is in bad faith for doing so."); *Carpenters Health and Welfare Trust Funds for California v. Robertson (In re Rufener Construction, Inc.)*, 53 F.3d 1064, 1068 (9th Cir. 1995) ("[I]t would be a gross abuse of our discretion . . . to penalize litigants for raising colorable legal claims simply because they are ones of first impression"); *Wolf v. Kupetz (In re Wolf & Vine, Inc.)*, 118 B.R. 761, 769 (Bankr. C.D.Cal. 1990) ("[T]here is probable cause to support an action, where the applicable law is unsettled and the facts support a plausible construction of the law.").

The Ninth Circuit's condonation of the Bankruptcy Court's effective imposition of sanctions in this case will result in the chilling of vigorous and creative representation not only of trustees but of any client. As in *Operating Engineers*, *supra*,

> the imposition of sanctions in this case has

> implications well beyond this particular matter. The award, if upheld, would imply that attorneys in general should exercise little, if any, creativity in their representation of clients, that they should not argue for new but plausible interpretations of agreements, and that they should not read ambiguous cases in the way most favorable to their clients.

859 F.2d at 1344.

Accordingly, certiorari should be granted so that: (1) this Court may clarify and confirm that sanctions, especially against trustees and their counsel, are inappropriate in matters of first impression where a colorable claim is presented; and (2) to enable the Trustee to seek the reversal of the Order denying the Motion to Amend, so that the unjust and ill-advised sanctions may be appealed.

X.
CONCLUSION

This case raises two important issues: (1) whether foreclosure of stock securing any type of loan is exempt from the automatic stay of § 362(a), and (2) whether the imposition of sanctions in matters of first impression where a colorable claim is raised is outside the purpose, intent and spirit of Rule 9011. Resolution of these issues is appropriate at the present time, because of their broad-based importance. Millions of people have invested in the booming stock market, and several hundred thousand people also file bankruptcy each year. It is inevitable that many of those debtors have stock and keep their stock on account at brokerage houses. But not all of them purchased their stock on margin. Stock values could drop at any time, resulting in putative "margin" calls. When that inevitable event occurs, § 362(b)(6) will be implicated. Although § 362(b)(6) should not always protect brokers, because of the Ninth Circuit's decision, brokers are absolutely immune from the automatic stay in all cases. The Ninth Circuit decision, while affording protection to brokers, upsets the delicate balance of interests between debtors and creditors maintained by the Bankruptcy Code, and gives brokers preferential treatment over other creditors. This Court should address this important intersection of the nation's commercial laws, namely bankruptcy and securities, now, before more debtors and estates are injured.

The Court should also consider whether the imposition of sanctions in matters of first impression where the facts give rise to colorable arguments is beyond the purpose, intent and spirit of Rule 9011. The imposition of sanctions in matters of first impression where the facts allow good faith arguments suppresses creative legal thinking and impairs the ability of counsel to fully represent clients. As matters presently stand, the Trustee is unable to appeal the sanctions effectively imposed by the Bankruptcy Court. The denial of the Motion to Amend needs to be reviewed and reversed to allow the Trustee to appeal the sanctions and correct the inappropriate actions taken by the Bankruptcy Court.

For the above reasons, the Petitioners respectfully request that this Court grant Certiorari in this case.

Respecfully Submitted,

DAVID R. WEINSTEIN*
ALEXANDRA PELKAN
Weinstein, Eisen & Levine
1925 Century Park East, Suite 1150
Los Angeles, California 90067-2712
310-203-9393

Counsel for Petitioners
**Counsel of Record*

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re:	)	
HERBERT HERMAN	)	
WEISBERG; DELPHINE	)	
RUTH WEISBERG,	)	
Debtors,	)	
_____	)	No. 96-55528
EDWARD M.	)	BAP No.
WOLKOWITZ, Trustee;	)	CC-94-01258-VJO
Plaintiff-Appellant,	)	ORDER
and	)	
DAVID R. WEINSTEIN,	)	
Appellant,	)	
v.	)	
SHEARSON LEHMAN	)	
BROTHERS, INC.,	)	
Defendant-Appellee.	)	
_____	)	

Before: LAY,* SCHROEDER AND GOODWIN, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. The petition is therefore DENIED.

---

*Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re:	)	
HERBERT HERMAN	)	
WEISBERG; DELPHINE	)	
RUTH WEISBERG,	)	
Debtors,	)	
_____	)	No. 96-55528
EDWARD M.	)	BAP No.
WOLKOWITZ, Trustee;	)	CC-94-01258-VJO
Plaintiff-Appellant,	)	OPINION
and	)	
DAVID R. WEINSTEIN,	)	
Appellant,	)	
v.	)	
SHEARSON LEHMAN	)	
BROTHERS, INC.,	)	
Defendant-Appellee.	)	
_____	)	

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Volinn, Jones, and Ollason, Judges, Presiding

Argued and Submitted
January 8, 1998--Pasadena, California

Filed February 17, 1998

Before: Donald P. Lay,* Alfred T. Goodwin and
Mary M. Schroeder, Circuit Judges.

Opinion by Judge Lay*

COUNSEL

David R. Weinstein, Weinstein & Eisen, Los Angeles, California, for the plaintiff-appellant.

Stacey M. Garrett, Keesal, Young & Logan, Long Beach, California, for the defendant-appellee.

OPINION

LAY, Circuit Judge:

This case concerns the applicability of the automatic stay provision under 11 U.S.C. §S 362 to the liquidation of a debtor's shares of stock by a stockbroker under a "margin loan."

Herbert Herman Weisberg ("Weisberg") entered a "Client Agreement" with Shearson Lehman Brothers, Inc. ("Shearson"), a licensed stockbroker, and placed shares of stock in a cash account with Shearson. The Client Agreement

---

*Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

contained terms by which a customer could purchase, sell, or borrow securities as well as borrow against securities. On or about October 8, 1990, Weisberg borrowed $50,000 from Shearson and transferred the stock in his cash account into a margin loan account to secure the loan.

Shearson required Weisberg to maintain at least 35% of the account's total market value in the account. Under the terms of the Client Agreement, if the account's market value were to fall, Shearson would issue a "margin call" to Weisberg to deposit cash or other equity in the account to increase the equity and reduce the margin. If Weisberg did not respond to the call within four days, the agreement authorized Shearson to liquidate shares of the stock and apply the proceeds to the margin debt to restore the 35% equity ratio.

On November 26, 1991, Weisberg filed for bankruptcy. Between December 1991 and October 1992, Shearson issued fourteen margin calls on Weisberg's account. Weisberg, as well as the bankruptcy trustee, did not respond to any of the calls. Shearson liquidated limited amounts of Weisberg's shares of stock to cover each margin call and to reestablish the equity ratio in Weisberg's account. Shearson did not seek relief from the automatic stay before liquidating Weisberg's stocks.

The trustee filed a complaint alleging, in part, that Shearson had violated the automatic stay by liquidating Weisberg's stocks to cover the margin calls. Shearson and Weisberg filed cross-motions for summary judgment. The

bankruptcy court granted Shearson's motion, finding that Section 362(b)(6) expressly allowed Shearson to liquidate the stocks without obtaining relief from the automatic stay. The bankruptcy court also concluded that imposition of Rule 9011 sanctions were warranted because Section 362(b)(6) resolved the issue presented by the trustee's complaint.

The bankruptcy court gave the parties the opportunity to reach a settlement, off the record, regarding the payment of the sanctions. In so doing, the bankruptcy court instructed the parties that any settlement would be in lieu of a court order and would not be subject to appeal. The trustee did not object to this proposal. During recess, the parties reached a settlement by which the trustee's counsel would pay approximately $11,000 to Shearson. The bankruptcy court entered summary judgment in favor of Shearson, and the judgment stated the parties had resolved the issue of sanctions off the record.

Thereafter, the trustee filed a motion under Rule 9023 and Fed. R. Civ. P. 59(e) to alter or amend the summary judgment order to include reference to the imposition of the sanctions. The bankruptcy court concluded the trustee's motion was frivolous, denied the motion, and imposed additional sanctions on the trustee and his counsel.

The Ninth Circuit Bankruptcy Appellate Panel ("BAP") affirmed the bankruptcy court's grant of summary judgment on the ground that Section 362(b)(6) allowed Shearson to liquidate Weisberg's securities without obtaining relief from the automatic stay. *In re Weisberg*, 193 B.R. 916,

925 (B.A.P. 9th Cir. 1996). The BAP also concluded that even if Section 362(b)(6) did not apply, it would affirm the grant of summary judgment because the trustee was estopped from alleging damages for the violation of the automatic stay. *Id.* at 926. The BAP held it had no jurisdiction to review the stipulation between the parties as to the agreed upon sanctions, inasmuch as there was no appealable final or interlocutory order. *Id.* at 928. The BAP, however, affirmed the bankruptcy court's denial of the trustee's motion to amend or alter the summary judgment and imposition of additional sanctions or filing the motion. *Id.* at 929. The trustee appeals each of these decisions.

DISCUSSION

This court independently reviews the BAP's decision. We review the BAP's findings of fact under a clearly erroneous standard and its conclusions of law de novo. *See United States v. Battley*, 969 F.2d 806, 810 (9th Cir. 1992).

A. *Applicability of Section 362(b)(6)*

Section 362(b)(6) of the Bankruptcy Code allows a stockbroker to make certain setoffs under a securities contract without obtaining relief from the automatic stay. Specifically, Section 362(b)(6) exempts:

> [T]he setoff by a . . . stockbroker . . . of

> any mutual debt and claim under or in connection with . . . securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section . . . 741 . . . of this title, . . . arising out of . . . securities contracts against cash, securities, or other property held by or due from such . . . stockbroker . . . to margin, guarantee, secure, or settle . . . securities contracts. 11 U.S.C. § 362(b)(6).[1]

The trustee first argues the BAP erroneously concluded that mutual debts existed between Shearson and Weisberg such that setoff was appropriate under Section 362(b)(6). The BAP found that Shearson was obligated by the Client Agreement with Weisberg "to deal with the debt and the collateral in accordance with its terms," and that this obligation fell within the Bankruptcy Code's broad definition of a "debt."[2] *In re Weisberg*, 193 B.R. at 922. The BAP then

---

[1]As the BAP noted, there is scant legal precedent interpreting Section 362(b)(6). *In re Weisberg*, 193 B.R. at 922.

[2]Section 101(12) of the Bankruptcy Code defines a "debt" as a "liability on a claim." Section 101(5) defines a "claim " as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

concluded the Client Agreement created mutual obligations, which satisfied the mutual debt requirement of the Section 362(b)(6) exception. *Id.*

[1] We agree with the BAP's findings. The Client Agreement imposed obligations upon Shearson that give rise to a potential claim against Shearson. At the time the bankruptcy petition was filed, any such claim against Shearson was unmatured. Under the Code's broad definition of "claim," however, it would appear that such an unmatured claim could form the basis of a "debt" for setoff purposes.[3]

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. 11 U.S.C. S 101(5).

[3]The cases cited by the trustee in support of its arguments, *In re Drexel Burnham Lambert Group, Inc.*, 113 B.R. 830 (Bankr. S.D.N.Y. 1990) and *Boston Safe Deposit & Trust Co. v. Google*, 130 B.R. 126 (Bankr. D. Conn. 1991), are inapposite to this analysis. In both *Drexel* and *Google*, the banks seeking setoff did not have a secured loan; they had no security interest in the collateral pledged for the loan. Therefore, the obligations imposed on the banks by virtue of a security agreement did not exist in those cases, as they do in this case. In *Drexel*, the court noted the bank held the collateral as a bailee or constructive trustee, without color of lien. 113 B.R. at 848. There could therefore be no mutual debt because the title to the property remained with the debtor. Id . In *Google*, because title to the collateral remained with the bankruptcy estate and not the bank, the collateral could not be converted into a

For these reasons, it does not appear the BAP erred in concluding mutual, pre-existing debts existed that Shearson was entitled to offset.

The trustee also argues the Client Agreement does not constitute a "securities contract" as defined by the Bankruptcy Code, and therefore, Section 362(b)(6) cannot apply to this case. Instead, the trustee argues, the $50,000 loan secured by Weisberg's stocks constituted a simple loan transaction, similar to a mortgage on real property. The BAP found that, while the Client Agreement did not technically fit the Code's definition of a securities contract,[4] the Client Agreement, in substance, involved the "purchase and sale" of securities and thus qualified as a securities contract. *In re Weisberg*, 193 B.R. at 923-24. In so doing, the BAP looked to securities law and found that the pledge of securities to secure a margin brokerage account constituted "purchase and sale" for the purposes of Section 10(b) of the Securities and Exchange Act. *See United States v. Kendrick*, 692 F.2d 1262, 1265 (9th Cir.

---

debt owed from the bank to the debtor. 130 B.R. at 128-29. These decisions are not applicable to this case because Weisberg granted Shearson a security interest in his shares of stock.

[4]Section 741(7) of the Bankruptcy Code defines a "securities contract" as a "contract for the purchase, sale, or loan of a security . . . or the guarantee of any settlement of cash or securities by or to a securities clearing agency." 11 U.S.C. § 741(7).

1982).[5] By extension, the BAP concluded that the Client Agreement, in function, provided for the purchase and sale of Weisberg's securities, and thus constituted a securities contract. *In re Weisberg*, 193 B.R. at 925.

[2] The legislative history of Section 362(b)(6) illuminates the harm Congress intended to avoid by providing the exception:

> It is essential that stockbrokers and securities clearing agencies be protected from the issuance of a court or administrative agency order which would stay the prompt liquidation of an insolvent's positions, because market fluctuations in the securities market create an inordinate risk that the insolvency of one party could trigger a chain reaction of insolvencies of the others who carry accounts for that party and undermine the integrity of those markets.

---

[5]In concluding the pledge of Weisberg's securities constituted a sale of securities, the BAP relied on cases interpreting "purchase and sale" of securities under the Securities and Exchange Act. *See In re Weisberg*, 193 B.R. at 923-25. Because there are no decisions interpreting the meaning of "securities agreements" for purposes of Section 362(b)(6), the BAP was correct to turn to securities law for guidance. Under that body of law, this court has held that a pledge of securities to secure a margin brokerage account constitutes a "purchase and sale" of securities. *United States v. Kendrick*, 692 F.2d 1262, 1265 (9th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983); *see First Baptist Church v. Keating*, 49 F.3d 541, 544 (9th Cir. 1995); *Harmsen v. Smith*, 693 F.2d 932, 947 (9th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983).

128 Cong. Rec. S15981, (daily ed. July 13, 1982)(remarks of Sen. Dole). Congress recognized that securities have a unique nature, either as bankruptcy estate property or as collateral, because of the rapid fluctuations of the securities market and the interdependent nature of those transacting in the market. In light of these unique characteristics, securities given as collateral should not be treated in the same manner as other, more stable collateral such as cash or real property.

[3] We conclude that the transaction between Weisberg and Shearson is the type of transaction Congress intended to exempt from the automatic stay in Section 362(b)(6).[6] As a licensed stockbroker, Shearson is required by law to maintain a 35% equity ratio in its margin accounts. In order to do this, Shearson must be able to liquidate shares on short notice in the event the customer fails to add the requisite equity to the account The need to readjust the equity ratio in any account may arise suddenly due to market

---

[6]This holding does not contravene the principle that exceptions to the automatic stay are to be construed narrowly. *See Hillis Motors, Inc. v. Hawaii Automobile Dealers' Assoc.*, 997 F.2d 581, 590 (9th Cir. 1993). The Code's definition of "security contract" includes a contract for the sale of securities. 11 U.S.C. § 741(7). The BAP concluded a pledge of securities to collateralize a margin account constitutes a "sale of securities" for purposes of Section 362(b)(6). This interpretation does not stretch the plain meaning of Section 741, nor read provisions into the Section where none exist. This interpretation is also consistent with the legislative intent behind the Section 362(b)(6) exemption and the underlying nature of the financial transactions between Weisberg and Shearson.

fluctuations. This is the type of fluid market transaction Congress contemplated when it enacted Section 362(b)(6). That the securities in Weisberg's margin account were pledged as collateral for a loan is irrelevant. The Client Agreement authorized Shearson to sell Weisberg's securities in the event Weisberg failed to meet a margin call, and therefore constituted in effect a securities agreement. The trustee cannot obviate the true nature of Weisberg's financial relationship with Shearson by characterizing the transaction as a simple loan transaction.

We affirm the BAP's conclusion that Section 362(b)(6) allowed Shearson to liquidate Weisberg's securities without first obtaining relief from the automatic stay. We therefore do not need to review the grant of summary judgment on the alternative ground that the trustee and Weisberg were estopped from alleging a violation of the automatic stay.

B. *Sanctions*

1. *Sanctions for Bringing Complaint*

In the proceedings below, the trustee asked the BAP to determine whether the bankruptcy court abused its discretion by requiring the trustee to pay sanctions, either voluntarily or by order, in light of the novel issue this case poses regarding the interpretation of Section 362(b)(6). The BAP refused to do so, finding it had no jurisdictional basis to

review the sanctions settlement because it was not premised on an order of the court. *In re Weisberg*, 193 B.R. at 928. The trustee now asks this court to recognize such jurisdiction and reverse the bankruptcy court's imposition of sanctions.

This court's jurisdiction is limited in the same manner as the BAP's jurisdiction. Under 28 U.S.C. § 158, the courts of appeals have jurisdiction to review all final decisions, judgments, orders and decrees entered by district courts or bankruptcy appellate panels in connection with the review of orders and decrees issued by the bankruptcy judges. 28 U.S.C. § 158(d). This court, therefore, restricts its inquiry to whether the BAP correctly concluded that it lacked jurisdiction to decide this issue.

[4] The BAP found that the trustee elected to pursue a settlement arrangement for the payment of sanctions rather than having the bankruptcy court impose sanctions by order. *In re Weisberg*, 193 B.R. at 928. The bankruptcy court informed the trustee that any payment of the sanctions under a settlement agreement would not be subject to appeal. The trustee did not object to those terms. As a result, the bankruptcy court did not expressly impose sanctions. The BAP concluded that without an order to review, it had no jurisdiction to review the imposition of sanctions. Title 28 U.S.C. § 158 strictly limits the actions the BAP has jurisdiction to review to orders and decrees issued by a bankruptcy judge. There was no such order for the BAP to review in this case. Therefore, the BAP did not err by declining jurisdiction to review the sanctions imposed on the

trustee for filing the complaint.

2. *Sanctions for Motion to Amend Summary Judgment Order*

[5] The trustee also contends the bankruptcy court abused its discretion by imposing additional sanctions on the trustee for bringing a frivolous Rule 59 motion. The trustee sought to amend the summary judgment order to reflect the payment of the first sanctions so that the trustee could appeal the imposition of those sanctions. We find that the trustee's attempt to create an appealable issue by filing the Rule 59 motion was not frivolous. We therefore reverse the bankruptcy court's order imposing sanctions on the trustee in the amount of $3,293. Each party shall pay its own costs on appeal.

The BAP's decision is AFFIRMED, in part and REVERSED, in part.

UNITED STATES
BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re	)	BAP. No. CC-94-1258-VJO
HERBERT HERMAN	)	BK. NO. LA 91-10097-BR
WEISBERG and	)	Adv. No. LA 93-01419-BR
DELPHINE RUTH	)	
WEISBERG,	)	
Debtors.	)	
_____	)	
	)	
EDWARD M.	)	
WOLKOWITZ and	)	
DAVID R. WEINSTEIN,	)	
Appellants,	)	
	)	OPINION
v.	)	
	)	
SHEARSON LEHMAN	)	
BROTHERS, INC.,	)	
Appellee.	)	
_____	)	

Argued and Submitted on November 15, 1995
at Los Angeles, California

Filed - MAR 14 1996

Appeal from the United States Bankruptcy Court
for the Central District of California,

Honorable Barry Russell, Bankruptcy Judge, Presiding

Before: VOLINN, JONES, and OLLASON, Bankruptcy Judges.

VOLINN, Bankruptcy Judge:

OVERVIEW

The debtor borrowed $50,000 from a stockbroker and provided collateral in the form of stock which was deposited in a margin account. After the debtor filed bankruptcy, as the stock decreased in value, the stockbroker at intervals, issued margin calls, and, on failure of the debtor or trustee to respond liquidated portions of the stock without first seeking relief from the automatic stay of 11 U.S.C. § 362.[1]

On the trustee's complaint for violation of the automatic stay and turnover of post petition transfers, the bankruptcy court ruled that the stockbroker's post petition

---

[1]Unless otherwise stated, all references to "sections" and "rules" refer to the Bankruptcy Code, 11 U.S.C. SS 101 et seq. and the Federal Rules of Bankruptcy Procedure.

liquidation of the pledged stock was clearly exempted from the reach of the automatic stay by § 362(b)(6).[2] The court stated its intention to grant appellee's motion for sanctions (basically, appellee's attorney fees)under Rule 9011 for filing the complaint, but offered appellants an opportunity to reach agreement or stipulation with opposing counsel which would obviate the need for entry ot an order on sanctions. Counsel then conferred privately and stipulated to an arrangement for payment of sanctions without order of the court. Judgment on

---

[2] (b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5 (a) (3) of the Securities Investor Protection Act of 1970, does not operate as a stay--

> (6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts.

11 U.S.C. S 362 (b) (6).

the merits was entered with no provision for or imposition of sanctions. The trustee moved to amend the judgment, to clarify his right to appeal the sanction. The court denied the motion and imposed sanctions against the trustee and his counsel for having brought the motion. The trustee and his counsel now appeal: (1)the ruling on the merits,(2)the provision for payment of sanctions which was stipulated to by counsel without order of the court, and (3)the sanction imposed by the court for seeking to amend the judgment. We AFFIRM.

FACTS AND PROCEEDINGS BELOW

Prior to August 21, 1990, debtor Herbert Herman Weisberg ("the debtor") owned unencumbered shares of stock of City National Corporation ("the stock"). On August 21, 1990, the debtor signed a "Client Agreement" with Shearson Lehman Brothers, Inc. ("Shearson"), a licensed stockbroker, and put the stock in a cash account with Shearson.

On or about October 8, 1990, the debtor borrowed $50,000 from Shearson and transferred the stock from the cash account into a "margin loan" account to secure the loan. When Shearson advanced the funds to the debtor, it treated his stock as on "margin." While the debtor continued to own or carry the full value of the stock, then $105,235, as far as Shearson was concerned, with the transfer to the margin account, Weisberg had equity of only some $55,000 (105,235

- 50,000 = 55,235). This type of account required that the customer maintain an equity position of at least 35% over the market value of the account; if the value of the equity were to fall, Shearson would issue a "margin call" to the customer to deposit cash or other equity into the account to increase the equity and reduce the margin. If the customer failed to respond to the call within four business days, Shearson would have the right under its Client Agreement and responsibility under the rules of the national stock exchange and the Federal Reserve Board, and pursuant to federal statute to liquidate sufficient shares of the stock and apply the proceeds to reduce the margin debt to restore the 35% equity ratio. On October 8, 1990, when the stock was transferred into the account, the ratio of equity to value was some 52% ($55,000 (equity) ÷ $105,000 (total value) = .52), which exceeded the required 35%.

When the value of the stock fell, Shearson made a margin call on the debtor to maintain the equity ratio. The first call noted in the record was made on November 25, 1991. The following November 26, 1991, without responding to the margin call, the debtor filed a chapter 11 petition. Thereafter, the debtor, until July 1992, some seven months, functioned as debtor in possession. In July 1992, Edward M. Wolkowitz was appointed chapter 11 trustee.

The record shows that over the course of eleven months following the filing of the petition, Shearson made some fifteen calls, without response or reaction from either

the debtor or the trustee.[3] When the calls remained unanswered past their deadlines, Shearson sold stock sufficient to reduce the loan balance and maintain the required margin in the account. Shearson never sought relief from the automatic stay prior to selling the stock. By August 18, 1993, the value of the account was $5,602, of which $2,412.15 was equity and $3,187.85 margin debt.

On January 29, 1993, the trustee filed a complaint setting forth three claims for relief. The first claim invoked § 549 of the Bankruptcy Code which provides for avoidance of post-petition transfers.[4] The trustee states that Shearson

---

[3]We found no indication in the record provided to the panel for review that the trustee (or the debtor) was in contact with Shearson regarding the account prior to filing the complaint. In its request for admissions propounded in discovery, Shearson asked the trustee to admit that the first demand made on Shearson by the trustee was in December 1992. The trustee refused to so admit, but the issue has not been pursued to resolution.

To place events in some perspective: the chapter 11 case was filed, and the first margin call issued, in November 1991. The debtor remained debtor in possession for the next seven months; Shearson issued margin calls over this period of time, the last call in our record having issued in October 1992, three months after the trustee's appointment. Shortly thereafter, in January 1993, the trustee commenced this action.

[4][T]he trustee may avoid a transfer of property of the estate--

(1) that occurs after the commencement of the case; and

(2)(A) that is authorized only under section

was a secured creditor as of the date of bankruptcy, November 26, 1991, and that the net value of the account over and above the $50,000 loan was some $26,000. According to plaintiff, the estate was entitled to this equity which actually increased as the value of the stock went up, the equity having gone as high as some $53,000 on or about February 29, 1992. Nevertheless,

> Shearson, without knowledge of the trustee or permission of the bankruptcy court, effectuated sales of stock from the account after the date the bankruptcy petition was filed ('post-petition transfers'). As a result of the post-petition transfers, Shearson as a creditor prompted its own repayment of the margin loan. Plaintiff is informed that the equity in the stock in the account is now dissipated or nearly dissipated.

Plaintiff's complaint at ¶ 11.

The trustee's second claim sought damages resulting from violation of the automatic stay. The trustee realleged the facts set forth in the first claim under § 549 and simply stated that Shearson willfully sold the stock and refused to turn over

---

> 303(f) or 542(c) of this title; or
>
> (B) that is not authorized under this title or by the court.

11 U.S.C. § 549(a).

to plaintiff "the account, the stock or equity therein" as a result of which the trustee was entitled to damages including punitive damages. *Id.* at ¶ 15.

The third claim was for turnover. The trustee invoked § 542 for turnover of the City National Bank stock or its value as it existed on the date of the bankruptcy petition "or was enhanced thereafter, and, as may appear necessary, further ordering Shearson to execute such documents of sale or conveyance, as may be necessary to give effect to the judgment for turnover." *Id.* at ¶ 20.

Shearson admitted in paragraph 11 of its answer that it liquidated portions of the stock from time to time after the debtor filed bankruptcy, explaining it did so for the purpose of satisfying "margin maintenance calls" because, in the absence of the deposit of funds by the debtor or the trustee, Shearson was required, under federal securities laws and the rules of the Federal Reserve Board and the National Securities Exchange, to liquidate portions of the account to meet the margin maintenance calls. Shearson further contended that this liquidation was expressly permitted by the exception to the automatic stay set forth in § 362(b)(6). Shearson also admitted that as of the date of the complaint, February 24, 1993, the equity in Weisberg's account was $4,315.64.

Shearson responded further with nine affirmative defenses which may be condensed to the following:

1. That by virtue of § 362(b)(6) and § 355, and its status as a stockbroker involved in a securities contract as

defined by § 741, it was not in violation of the automatic stay.

2. That by failing to respond to the numerous margin calls over a long period of time, the debtor and the trustee violated their fiduciary duty of prudence and due care, waived their right to rely on the automatic stay, and were estopped to rely on its application.

3. That the stock in their possession was the subject of a perfected security agreement and that the debtor had agreed that it be treated on a margin basis; that the trustee admitted the stock was pledged as collateral for the $50,000 loan from Shearson.

4. Shearson raised other defenses *including, inter alia*, waiver and estoppel, because the failure the debtor and the trustee to liquidate the account or seek a stay of Shearson's actions despite Shearson's repeated notices to them of the status of the account and the consequences of inaction.

Cross-motions for summary judgment were argued on September 13,1993. Shearson contended that its sale of stock when the debtor failed to answer the margin calls fall squarely under § 362(b)(6). Shearson sought sanctions of some $11, 000 under Rule 9011 for its attorneys fees and costs. Thus, the parties' contentions and arguments focused on Shearson's position as a stockbroker involved in a margin transaction, thereby rendering its liquidations subject to exception from the automatic stay.

The court agreed, holding that § 362(b)(6) clearly and unambiguously applied to the facts and circumstances before

it, and therefore, no stay violation occurred. Accordingly, the court ordered summary judgment for Shearson and denied the trustee's cross-motion.

The court stated that because § 362(b)(6) so evidently applied, Rule 9011 sanctions were warranted in the amount requested. However, the court indicated its reluctance to impose sanctions by an order on the record and stated that counsel could resolve the issue off the record by stipulation. The court expressly pointed out that settlement, since it would dispense with an order, would preclude an appeal as to the issue of sanctions. After a recess, the parties informed the court that an arrangement had been reached; accordingly, no sanction was ordered.[5]

Shearson served the trustee and lodged with the court a proposed order and proposed judgment on September 16, 1993. The judgment stated that the issue of sanctions had been resolved off the record. The trustee gave no indication on the record, nor any notice to the court, prior to entry of the judgment, that the stipulation with counsel as to sanctions and payment thereunder would be the subject of a request for review by appeal or otherwise. On October 8, 1993, the trustee filed a motion under Rule 9023 and Fed.R.Civ.P. 59(e) to alter or amend the judgment. The trustee asserted that he

---

[5]Under the arrangement, Shearson received a payment of $6,000 from plaintiff's counsel and an administrative claim superior to the trustee and his counsel for the balance of the amount (some $5,000) sought in its motion.

had not waived his appeal rights as to the sanction and asked the court to amend the judgment to reflect that sanctions had been imposed in order to clarify this position. Shearson opposed the motion and requested further sanctions of $3,293. The motion was heard on January 4, 1994. The court denied the motion and found it frivolous. The court imposed sanctions of $3,293 against the trustee and his counsel, jointly and severally.

The trustee and his counsel now appeal: 1) summary judgment on the merits that Shearson's sale of stock was exempt from the automatic stay; 2) the propriety of, the "sanctions" paid to Shearson for commencing and pursuing the adversary proceeding; 3) denial of the motion to amend the judgment relative to the sanction issue and the sanctions imposed thereon.

STANDARD OF REVIEW

A summary judgment is reviewed *de novo*, as are the court's conclusions of law determined therein. *In re Florida*, 164 B.R. 636, 639 (9th Cir. BAP 1994). All aspects of a trial court's award of sanctions under Rule 9011 are reviewed for abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *In re Rainbow Magazine. Inc.*, 136 B.R. 545, 550 (9th Cir. BAP 1992).

ISSUES PRESENTED

1. Whether the court committed reversible error when it determined that Shearson's sale of stock in the debtor's account was exempt from the automatic stay.

2. Whether the trustee has a right of appeal of damages paid voluntarily in the absence of a court order.

3. Whether the court abused its discretion by imposing sanctions for the Rule 59(e) motion.

DISCUSSION

I. The Effect of the Automatic Stay.

The appellants argue two basic propositions here: First, that there was no pre-existing mutual debt which permits set-off by Shearson, and second, that the exception of § 362(b)(6) was inapplicable to a transaction which was basically a loan and a pledge.

A. Mutuality

Appellants expended considerable energy at the trial level and an appeal contending that the exercise of Shearson's right of setoff was dependent on the existence, prior to bankruptcy, of a mutual debt between the parties; that such mutuality did not exist because Shearson had not incurred a prepetition obligation to the debtor. Appellants contend that Shearson could become obligated only by selling the stock in violation of the § 362 stay and delivering insufficient

proceeds to the debtor, which would be a post-petition obligation.

The trustee's position, while using Bankruptcy Code provisions, (§§ 362, 549 and 542) as a vehicle, at bottom is based on the premise that Shearson mishandled or abused its position as a secured creditor holding collateral, all to the trustee's damage. Such a creditor was not free of any obligation to the debtor, since it was obligated by the agreement with the debtor to deal with the debt and the collateral in accordance with its terms. The agreement entered into prior to bankruptcy created mutual obligations which fall well within the broad definition relating to claims in the Bankruptcy Code. Section 101(11) defines "a debt" as a "liability on a claim." Section 101(5) defines "claim" as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5).

Thus, the definition of "claim" is extremely broad, covering claims of a contingent or unmatured nature. *See Pennsylvania Dept. of Public Welfare v. Davenport,* 495 U.S. 552, 558 (1990) (Congress intended meanings of "debt" and "claim" to be coextensive and thus a criminal restitution obligation falls within definition of "debt" and "claim); *Johnson V. Home State Bank,* 501 U.S. 78, 80 (1991) (The mortgage lien that survives the discharge of a debtor's personal liability in Ch. 7 is a "claim" within the terms of § 101(5) susceptible to treatment by a Ch. 13 plan).

Based on the foregoing considerations, the trustee's contentions as to mutuality or lack of it are without merit.

B. Section 362(b)(6)

Pursuant to § 362(a), virtually all actions against the debtor and its property are stayed automatically upon the commencement of a bankruptcy case. In § 362(b), the Code exempts some 18 distinct actions from operation of the automatic stay. Under the circumstances at issue here, § 362(b)(6) exempts:

> the setoff by [various entities including) *a.* . .stockbroker, financial institutions . . . of any mutual debt and claim under or in connection with . . .securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section. .

> . 741. . .of this title,. . .arising out of. . . securities contracts against cash, securities, or other property held by or due from such . . .stockbroker . . . to margin, guarantee, secure, or settle . . . securities contracts.

11 U.S.C. § 362(b)(6).

It should be noted that the coverage of § 362(b)(6) encompasses an array of activities and entities which includes "financial institutions."[6] It is common knowledge that the activities of banks and stockbrokers have broadened considerably to a point where each activity has converged and overlapped so that banks are involved in the sale of securities and stockbrokers are involved with money lending.

There is little legal precedent involving § 362(b)(6).[7] But it is clear that by virtue of § 362(b)(6), a stockbroker or a financial institution is not stayed from exercising its right to setoff a claim for a margin payment with securities of the

---

[6]This term, which includes commercial banks, savings banks, and various other banking entities, also includes a customer of the financial institution when the entity acts as agent for the customer in connection with a securities contract. 11 U.S.C. § 101(22).

[7]The single case cited and discussed by the parties, *In re Amcor Funding Corp.*, 117 B.R. 549 (D. Ariz. 1990), is inapposite. *Amcor* did not involve a margin call, but rather a broker who sought to liquidate its debtor-customer's account in the absence of a margin call when the broker itself became insolvent.

debtor which the broker holds to margin, secure, or settle a securities contract. Appellants contend that the element of a securities contract is absent; they characterize the transaction at issue as "a simple, commercial loan, secured by previously free-and-clear stock" which is beyond the reach of § 362(b)(6). Appellants contend that once bankruptcy intervenes, a secured lender holding collateral of a delinquent debtor must first seek relief from the automatic stay in order to foreclose on the collateral. Appellants argue that if the transaction were a loan where the collateral were real property, the automatic stay would be in force. Appellants urge the panel to consider that stockbrokers are not universally exempted from the automatic stay; they may enter into transactions that, depending on the particular circumstances, would not entitle them to the carefully drawn exceptions of § 362(b)(6). In sum, appellants' basic position is that the debtor owned the stock and had full dominion over it prior to his relationship with Shearson; his transaction with Shearson simply involved obtaining a loan for which the stock was pledged as collateral. At the inception of this transaction, the creditor was more than adequately protected, holding some $105, 000 of collateral to secure a $50,000 loan. Although this collateral, because of its nature, was subject to fluctuation in value, Shearson's unilateral setoff of its margin calls was not exempt from the automatic stay.

1. Was There a Securities Contract?

Appellants point out that under § 362(b)(6), the setoff of any mutual debt and claim must be one which is "under or in connection with . . . securities contracts, as defined in § 741 of this title, that constitutes the set-off of a claim against the debtor for a margin payment as defined in section 101, 741 or 761 of this title . . . ." The debtor contends that the relationship cannot be classified as a securities contract.

Section 741(7) states: "'securities contract' means contract for the purchase, sale, or loan of a security . . . or the guarantee of any settlement of cash or securities by or to a securities clearing agency." As to a margin payment, § 741(5) states that the term "means payment or deposit of cash, a security, or other property, that is commonly known to the securities trade as original margin, initial margin, maintenance margin, or variation margin . . . ." Appellants contend that none of the foregoing definitions apply to the basic transaction here. Taken literally, it would appear that since the transaction between the parties did not involve the purchase, sale, or loan of a security, nor a margin payment as defined in §§ 101 and 741, there is some question as to whether the exclusion should apply.

Although appellants would have us hew literally to the language of § 741(7), we do not scan its words "with the ease of a computer." *Bank of Marin v. England*, 385 U.S. 99, 103 (1966). While the pledge does not immediately appear to fit into the foregoing definitional terms, it clearly was a transfer of an interest. Section 101(54) states that "'transfer' means

every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption."[8]

In an analogous area dealing with securities regulation, a number of decisions have discussed the requirement that, a "purchase and sale" of securities must be involved in order for an action for fraud under the Securities Exchange Act, § 10(b) and Rule 10b-5. In *American Continental Corp. v. Keating, et al.*, 49 F.3d 541, 543 (9th Cir. 1995), the court stated, "Courts have generally recognized that this 'purchase and sale' requirement should be read flexibly in order to effect the securities laws' remedial purposes." (noting, *inter alia, Vine v. Beneficial Fin.Co.*, 374 F.2d 627, 634 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967), for "citing cases that 'indicate receptivity on different facts to a broad construction of 'sale' under the Act and the Rule,'"). In holding that the deposit of stock in an indemnity action trust constituted a purchase by the trust, the *American Continental* case stated:

---

[8]In the legislative history to section 101(54) the House Report states: . . . "Under this definition, any transfer of an interest in property is a transfer, including a transfer of possession, custody or control even if there is no transfer of title, because possession, custody, and control are interests in property." (H.R. Rep. No. 595, 95th Cong. 1st Sess. 314 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6271.

Although we find no case with facts directly on point, we take guidance from the various transactions that have been held to constitute a purchase and sale. For instance, in *Rubin v. United States*, 449 U.S. 424, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981), the Supreme Court held that a pledge of stock to a bank as collateral for a loan constituted a "sale" for purposes of Section 2(3) of the Securities Act of 1933.[9] The *Rubin* Court reasoned that

> the economic considerations and realities present when a lender parts with value and accepts securities as collateral security for a loan are similar in important respects to the risk an investor undertakes when purchasing shares. Both are relying on the value of the securities themselves, and both must be able to depend on the representations made by the transferor of the securities. . . .

Id. 449 U.S. at 431, 101 S.Ct. at 702.

Accordingly, this court has applied *Rubin* and *Weaver* to hold that a pledge of securities to secure a

---

[9][footnote 2 in original] In *Marine Bank v. Weaver*, 455 U.S. 551, 554 n. 2, 102 S.Ct. 1220, 1222 n. 2, 71 L.Ed.2d 409 (1982), the Court noted that its holding in *Rubin* also applied to a pledge forming the basis of a fraud claim under § 10(b) of the Securities Exchange Act of 1934.

> margin brokerage account constituted a "purchase and sale" for the purpose of Section 10(b) and Rule 10b-5. *United States v. Kendrick*, 692 F.2d 1262, 1265 (9th Cir. 1982), *cert. denied*, 461 U.S. 914, 103 S.Ct. 1892, 77 L.Ed.2d 282 (1983). *See also Harmsen v. Smith*, 693 F.2d 932, 947 (9th Cir. 1982), *cert. denied*, 464 U.S. 822, 104 S.Ct. 89, 78 L.Ed.2d 97 (1983).

49 F.3d at 543.

Mallis et al. v. Federal Deposit Insurance Corp., 568 F.2d 824, 828 (2d Cir. 1976), also held that a pledge of stock was a sale. The court referred to and cited from *United States v. Gentile*, 530 F.2d 461 (2d Cir.), *cert. denied*, 426 U.S. 936 (1976), which stated "In effect, the pledgee assumes a very real investment risk that the pledged securities will have continuing value, a risk that is identical in nature to the risk taken by investors which serves as the indisputable basis for statutory regulation of securities transactions. We therefore find no reason to treat the equivalent risks differently under the statute." 530 F.2d at 467 n. 6.

There is authority the other way. *Rispo v. Spring Lake Mews. Inc.*, 485 F.Supp. 462 (E.D. Penn. 1980), held that a promise to deliver stock made in conjunction with a commercial loan transaction did not constitute a sale or purchase of a security as to be governed by federal securities laws, and noted a split in the circuits. However, because of the Ninth Circuit holding in the *American Continental* case, we are of the view that the Ninth circuit would agree with

Mallis, which appears to represent the weight of authority. *Mallis* was followed by *Chemical Bank v. Arthur Anderson &Co.*, 726 F.2d 930 (2d Cir. 1984), which, after discussing the split in the circuits, concluded that it would follow *Mallis* and cited with approval *U.S. v. Kendrick*, 692 F.2d 1262-1265 (9th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) (cited in *American Continental*) as also following *Mallis*.

In order to evaluate how the law should be applied here, it is useful to observe the purpose of Congress in enacting § 362(b)(6). This can be discerned from the Congressional Record:

> It is essential that stockbrokers and securities clearing agencies be protected from the issuance of a court or administrative agency order which would stay the prompt liquidation of an insolvent's positions, because market fluctuations in the securities markets create an inordinate risk that the insolvency of one party could trigger a chain reaction of insolvencies of the others who carry accounts for that party and undermine the integrity of those markets.

128 Cong. Rec. S15981, (daily ed. July 13, 1982) (remarks of Mr. Dole).

Appellants' argument that the transaction did not involve a sale of stock but only a loan and pledge of stock as collateral elevates form over substance. It is clear that by virtue of the Language of S 362(b)(6), a stockbroker acting as a financial institution should have the benefit of ability to

move quickly because of market fluctuations where collateral such as stock is transferred by way of pledge to secure a loan. In our view, and consistent with the foregoing authorities, it is appropriate to equate the pledge with a sale in order to afford the stockbroker or financial institution holding stock as collateral to move quickly to avail itself of the collateral before it self destructs. Therefore, the exception of § 362(b)(6) would exempt Shearson from the stay of § 362(a).

2. Alternate Grounds For Affirmance

There are other grounds for affirming on this point. While the court's immediate disposition by summary judgment was based on its interpretation of § 362(b) (6), the decision can be affirmed on other grounds appearing on the record, albeit not argued. *See First Pacific Bank v. Gilleran*, 40 F.3d 1023, 1024-25 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 55 (1995). This principle applies in review of a summary judgment where the reviewing court may affirm an grounds other than those stated by the court below, if the record provides such grounds. *See J. Jack Brās v. Cal. Pub. Utilities Comm'n*, 59 F.3d 869, 872. (9th Cir. 1995), *cert. denied*, 116 S.Ct. 800 (1996). *See also In re Canino*, 185 B.R. 584 (9th Cir. BAP 1995).

> The panel may affirm the bankruptcy court an any grounds supported by the record. *In re Frontier Properties. Inc..*, 979 F.2d 1358, 1364 (9th Cir. 1992);

In re Bradford, 112 B.R. 347, 353 (9th Cir. BAP 1990). In addition, we may consider a legal issue not raised on appeal where the matter is one of law and further development of the factual record is not necessary. *Bolker v. Comm'r*, 760 F.2d 1039, 1042 (9th Cir. 1985). Whether a filing period is subject to equitable estoppel is a matter of law, reviewed de novo. *In re Santos*, 112 B.R. 1001, 1004 (9th Cir. BAP 1990).

185 B.R. at 594.

a. The Issue of Estoppel or waiver

Assuming arquendo that Shearson was not exempt from the automatic stay by virtue of § 362(b)(6), nevertheless it is clear that the debtor should have taken some action independently or in response to the margin calls. One cannot disregard the debtor's and the trustee's continued acquiescence with Shearson's effort to maintain an appropriate collateral-debt ratio. The debtor and trustee received fifteen margin calls over a period of eleven months. Their lack of response is inexplicable, particularly since cash collateral was involved. The debtor, having pledged the stock, should have taken the initiative to petition for its release while it had equity. The only rational basis for this inaction was the hope that the value of the stock would increase. But this hope was burdened by the agreement to treat the collateral on a margin basis. The trustee seeks the best of both worlds. Apparently, the trustee concludes that

Shearson was to insure any loss. Such a conclusion is not warranted on the facts of this case.

Shearson's liquidations were in response to the declining market value of its security. Shearson had an absolute right to its security, and to maintain it on a current margin basis. Shearson was not responsible for the decline in value of the collateral, and in fact, could do nothing to prevent it. Thus, it was the inaction of the debtor and subsequently the trustee, not Shearson's failure to move for relief from the stay, that resulted in the loss to the estate.

The injunctive aspect of § 362 is one which calls into play equitable principles. The question arises as to whether the debtor contributed to its alleged damage by remaining quiescent despite the numerous margin calls by Shearson. Pursuant to the equitable principle that equity aids the vigilant, the doctrine of laches would be applicable. *See Arthur Matthews Jr. v. Martin J. Rosene, et al.*, 739 F.2d 249 (7th Cir. 1984), where the court held that the debtor had unreasonably and inexcusably delayed asserting his claims against state court jurisdiction to the bankruptcy court. In that case the court stated:

> The First Circuit has applied equitable principles to protect creditors from unwarranted liability arising from application of S 362. In *In re Smith Corset Shops, Inc.*, 696 F.2d 971 (1st Cir. 1982), the creditors brought an action against the shop owner for trespass and ejectment . . . . The state ruled for the creditors,

> allowing them to move the shop owner's goods out of the store . . . . Unknown to anyone involved in the state court action, the shop owner four days earlier had filed for Ch. 11 reorganization . . . The First Circuit, however, reinstated the bankruptcy's court's ruling in favor of the creditors. The court ruled in part that § 362 is subject to equitable considerations . . .
>
> The equitable doctrine of laches can apply in a similar manner in this case to defeat Matthews' claims . . . . Suspension of § 362 automatic stay provisions may be consonant with the purposes of the Bankruptcy Act when equitable considerations weigh heavily in favor of the creditor and the debtor bears some responsibility for creating the problems.
>
> The district court did not abuse its broad discretion in applying laches here. The record supports the district court findings that Matthews unreasonably and inexcusably delayed asserting his claim against state court jurisdiction to the bankruptcy court and that Rosene would be seriously prejudiced if the state court order is voided.

739 F.2d at 251

In light of the facts before us, particularly the debtor and trustee's failure to take the initiative to do something about the debtor's collateral as required by §§ 363 and 361,

and their passive behavior with respect to the margin calls, the appellants' argument amounts to a "heads I win, tails you lose" proposition. If the stock went up, they could only win. If the stock went down, according to the complaint, Shearson would lose and have to make up to the debtor the market loss and the value of the stock. This would be a result which no principle of equity should countenance.

b. Implications to be Drawn From Shearson's Status as a Secured Creditor Holding Pledged Collateral

The granting of the collateral interest was a transfer which occurred prior to bankruptcy. Therefore, the effect of Shearson's liquidations after bankruptcy constituted foreclosure of an interest it already had rather than transfer. On this basis, § 549 is inapplicable. Also, because the stock was liquidated, it is not subject to turnover.

Returning to the complaint, it is interesting to note that the trustee at paragraph 1 suggests that "To the extent required by law, plaintiff can and will provide Shearson adequate protection in the form of a replacement lien against cash proceeds of the stock which may come into plaintiff's possession by virtue of his use, sale, or administration of the account or stock." This statement is made relative to the request that Shearson turn over the City National Bank stock or its value as of the date of the petition pursuant to § 542. Aside from the fact that trustee did not deny that Shearson has a valid security interest in the stock, implicit in the offer of

adequate protection is an admission that Shearson had a valid and subsisting security interest in the stock. The Uniform Commercial Code, § 9-305, specifically provides that possession by the secured party of negotiable instruments perfects a security interest without filing. under this section, possession of a stock certificate given as collateral for a debt constitutes perfection. *Heinecke Instruments Co. v. Republic Corp.*, 543 F.2d 700, 701-02 (9th Cir. 1976.

Stock or corporate securities constitute cash collateral as provided for by § 363(a).[10] which includes negotiable instruments and securities in its definition of cash collateral. Both the debtor and the trustee knew the stock was being sold by Shearson based an a formula which maintained a certain ratio of collateral value and debt. While there was a surplus equity, the debtor could have petitioned, pursuant to § 363 for the use or possession of the securities, but it could obtain the securities only by furnishing adequate protection in the form of a lien pursuant to § 361.[11] "Since Shearson already had a

---

[10]§ 363(a) provides:

> In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest . . .

[11]Section 361 provides three methods for providing adequate protection:

lien, the trustee's offer of adequate protection, particularly after the stock had been sold on a falling market, was illusory. Further, no offer of adequate protection was accompanied by a tender or any evidence of an ability to replace the stock with cash or property of commensurate value.

In any event, as indicated, the security interest was in cash collateral. The debtor would not be permitted access to the collateral without offering and furnishing adequate protection, which it never did. If the debtor had or has collateral, the value of which would be the indubitable equivalent of the City Bank stock, it is difficult to understand how the debtor would suffer any damage from the secured creditor's attempt to maintain the stock, which it did not have to part with unless, pursuant to S 361(3), its "indubitable equivalent" were furnished in order to maintain the stock at an

---

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;
(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
(3) granting such other relief, other than entitling such entity to compensation allowable under section 503 (b) (1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

agreed ratio of actual value.

C. Lack of Damages

Assuming arquendo an intentional violation of the stay, this case might present an issue as to damage. The underlying problem here is that if Shearson had an unassailable security interest in the property, what damages did the trustee suffer assuming violation of the automatic stay? Section 362(a)(4) enjoins "Any act to create, perfect, or enforce any lien against property of the estate." Section 362(h) provides that "An individual injured by any willful violation of a stay provided by this section shall recover actual damages including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."

Clearly, no one prevented the debtor or the trustee from requesting the surplus value of the securities. Even if Shearson had simply waited and had not made or acted on any margin call, on the record before us, it is hardly likely that the margin call was the cause of or contributed to the trustee's inaction. Thus it is, difficult to understand the trustee's disregard of the fact that had the debtor acted providently and promptly, Shearson's actions :a maintain the agreed relationship between the dropping value of its collateral and payment of debt would not have been required. Thus the debtor harmed itself.

As previously discuss character of the stock as cash

collateral, which requires the furnishing of an indubitable equivalent for its use, affects the issue of damages. In the case of *In re Lough*, 163 B.R. 586 (Bankr. D.Idaho 1994), the court held that the respondent credit union did not violate a stay by placing a freeze on a deposit securing its overdraft protection loan to debtor depositors. The court alluded to the case of *In re Edgins*,[12] 36 B.R. 480 (9th Cir. BAP 1984), stating:

> Moreover, even if ICCU's actions technically violated the automatic stay, the debtors would have no remedy. Section 362(h) provides . . . [for recovery of actual damages] . . ."; The debtors did not have the right to access money in the account without Court permission, and so could not be injured by the freeze. If the debtors tried to remove money from the account, it was an attempt to violate section 363 and ICCU's actions were justified; if the debtors did not try to remove money from the account, the presence of the freeze in no way harmed, hindered or injured the debtors' rights. Under the present facts, and in the absence of injury, sanctions under section 362(h) are inappropriate.

163 B.R. at 589.

It is clear that even if there were a violation of the

---

[12]The United States Supreme Court in *Citizens Bank of Maryland v. Strumpf*, 116 S.Ct. 286 (1995), has endorsed cases approving the administrative freeze.

stay, no showing has been made that the debtor incurred any damage or loss by virtue of the secured creditor's efforts to maintain the agreed equity ratio in the debtor's account. Because the stock was cash collateral, the burden was on the debtor to request sale of the stock an a prudent basis. It could not reasonably expect the secured creditor, holding the stock on a margin basis, to gamble on a rising market. The damage suffered by the estate was attributable to the debtor and the trustee's own failure to conserve the current value of the stock, rather than to the action taken by Shearson.

II. Appeal of "Sanctions"

The panel determines its jurisdiction *sua-sponte*. *In re Martinez*, 721 F.2d 262, 264 (9th Cir. 1983). The Bankruptcy Appellate Panel is able to hear appeals under 28 U.S.C. § 158. Pursuant to this statute, the panel has jurisdiction to review the orders of bankruptcy judges, whether final or interlocutory. 11 U.S.C. § 158(a). Appellants have no basis for review of their payment of Shearson's attorney fees because the payment was not premised on an order of the court.

Appellants argue that the court clearly ordered sanctions rom the bench, and that their off-the-record arrangement for payment of the sanction cannot change that. However, the court invited appellants to resolve the matter *in lieu of* an order, and hereafter, the court expressly did not

impose sanctions. As no sanction was ordered, the panel has no order to consider, and consequently, no jurisdiction to review.

Appellants paid a portion of the sanction by check accompanied by a letter specifying that payment was subject to the proviso that deposit of the check would acknowledge that the sanctions thus paid were appealable. Shearson deposited the check. Appellants contend that Shearson therefore waived its right to deny that the sanction is appealable. This contention ignores the basis for lack of jurisdiction. The parties cannot create jurisdiction either through agreement or waiver; there is no sanction order to review.

The appellants contend that it was not the intention of the court and the parties to deprive them of the right to appellate review. The record shows that the court and the appellees were willing to afford appellants an opportunity to settle the matter without an order being entered by the court. The matter was openly discussed. Appellants chose to accept this alternative. Considering the problems before them at the time, there was logic in their doing so. They were faced with the loss of a case in which a great deal of time had been expended. There was a prospect that the sanction order would be reported to the bar association. They did not know what would happen in the event of an appeal which might be won or lost. The stipulation presented an opportunity to forego the entry of an order which might be stricter and could have

adverse consequences in the event of losing the appeal. The stipulation provided not only for the settlement of a sanction amount but for partial payment in cash and for a super priority payment out of the estate f or the balance. This was certainly less onerous than being faced with the direct imposition by an order with more stringent terms. Further, even as to the super priority payment, appellees were faced with the possibility of creditors' objection to., the stipulation and were willing to take the risk in order to accommodate appellants. When the court entered the order, appellants gave no indication that they were considering appealing the stipulated provision for sanctions. Appellants calculatedly permitted the matter to be disposed of by the court without provision for sanctions.

III. The Motion for Reconsideration

Appellants moved for amendment of the judgment under Rule 59 (a) , which provides, "the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct entry of a new judgment."

"There are three grounds for granting new trials under Rule 59(a)(2): (1) manifest error of law; (2) manifest error of fact; and (3) newly discovered evidence." *Brown v. Wright*, 588 F.2d 708, 710 (9th Cir. 1978) (citing 6A *Moore's Federal Practice* ¶ 59.07 at 59-94). *See also School Dist, No. 1J,*

Multnomah County v. ACandS. Inc., 5 F.3d 1255, 1263 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2742 (1994) ("There may also be other, highly unusual, circumstances warranting reconsideration").

Although not directly stated, appellants' argument suggests that a manifest injustice would occur in the event they prevailed on the merits but nevertheless bore the burden of a losing party's attorneys fees. However, as previously discussed, there were no appealable sanctions to begin with. Appellants' argument is based on an alleged order, entry of which was deflected by their own considered action. Thus, the motion for reconsideration was based on a non-existing-hypothesis. It was without merit, and the court did not abuse its discretion by imposing sanctions.

CONCLUSION

The summary judgment is affirmed, as is the order denying the motion for reconsideration. The imposition of sanctions on the trustee and his counsel for seeking amendment of the judgment is affirmed.

AFFIRMED.

NOTICE OF ENTRY OF JUDGMENT

BAP No. **CC-94-1258-VJO** *In re Weisberg*

A separate Judgment was entered in this case on 3/14/96.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re:	)	No. 94-55965
HERBERT HERMAN	)	
WEISBERG and	)	BAP No.
DELPHINE RUTH	)	CC-94-01258-HMeO
WEISBERG,	)	
Debtors,	)	
	)	
EDWARD M.	)	
WOLKOWITZ,	)	
Plaintiff-Appellant,	)	
and	)	
DAVID R.	)	
WEINSTEIN,	)	MEMORANDUM*
Appellant,	)	
	)	
v.	)	
SHEARSON LEHMAN	)	
BROTHERS, INC.,	)	
Defendant-Appellee.	)	
	)	

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Hagan, Meyers, and Ollason, Judges, Presiding
Submitted January 25, 1995**

Before: WALLACE, Chief Judge, HALL and KLEINFELD, Circuit Judges.

Chapter 11 trustee Edward Wolkowitz and attorney David Weinstein appeal the Bankruptcy Appellate Panel's order dismissing their appeal as untimely. We have jurisdiction pursuant to 28 U.S.C. § 158(d), and we reverse the BAP's order of dismissal and remand for further proceedings in accordance with Arrowhead Estates Development Co. v. U.S. Trustee, Nos. 93-55530 and 93-56560, slim op. 15921, 15931 (9th Cir. Dec. 30, 1994).

REVERSED AND REMANDED.

**The panel unanimously finds this case suitable for without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

UNITED STATES BANKRUPTCY
APPELLATE PANEL OF THE NINTH CIRCUIT

In re	)	BAP No. CC-94-1258
HERBERT HERMAN	)	Bankruptcy No. LA91-10097
WEISBERG and	)	Adversary No. 93-01419
DELPHINE RUTH	)	
WEISBERG,	)	
Debtors.	)	
_____	)	
EDWARD M.	)	
WOLKOWITZ	)	
Appellant,	)	
v.	)	ORDER
	)	
SHEARSON LEHMAN	)	
BROTHERS, INC.,	)	
Appellee.	)	
_____	)	

Before: HAGAN, MEYERS and OLLASON, Bankruptcy Judges.

The Appellant's "Petition For Rehearing" and all pleadings filed in support of the Petition have been received and considered along with the record.

The Appellant's Petition For Rehearing is hereby ORDERED DENIED.

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re	)	BAP No. CC-94-1258
HERBERT HERMAN	)	Bankruptcy No.
WEISBERG and	)	LA91-10097
DELPHINE RUTH	)	Adversary No.
WEISBERG,	)	93-01419
Debtors.	)	
_____	)	
EDWARD M.	)	
WOLKOWITZ	)	
Appellant,	)	
v.	)	ORDER OF DISMISSAL
	)	
SHEARSON LEHMAN	)	
BROTHERS, INC.,	)	
Appellee.	)	
_____	)	

Before: RAGAN, MEYERS and OLLASON, Bankruptcy Judges.

The Appellant's Response To Notice Of Deficient Appeal And Possible Dismissal has been received and considered along with the record on appeal.

The ten day period to file a notice of appeal is tolled pending the entry of an order disposing of a motion to altar or

amend. Fed.R.Bankr.P. 8002(b), Further, a notice of appeal filed prior to the entry of an order disposing of a motion to altar or amend has no effect and a new notice of appeal must be filed. See In re Sweet Transfer & Storage. Inc., 896 F.2d 1189 (9th Cir. 1990) ; In re Crystal Sands Properties, 84 B.R. 665 (9th Cir. BAP 1988).

The record indicates that the Appellant filed his notice of appeal prior to the bankruptcy court entering an order disposing of a timely filed motion to altar or amend. The record further indicates that no amended or new notice of appeal was timely filed after the bankruptcy court entered an order disposing of the motion to alter or amend on February 15, 1994. Therefore, the record reflects that the Appellant has failed to timely file a notice of appeal.

Accordingly, this appeal is hereby ORDERED DISMISSED for lack of jurisdiction. The Appellant's Motion For Leave To File oversized Brief is further ORDERED DENIED as moot.

A certified copy of this order sent to the bankruptcy court shall constitute the mandate of the Panel.

APPENDIX B

UNITED STATES BANKRUPTCY COURT
FOR THE
CENTRAL DISTRICT OF CALIFORNIA

DAVID R. WEINSTEIN (State Bar No. 082881)
JACQUELINE D. DUBIN (State Bar No. 156188)
WEINSTEIN, EISEN & DOHERTY
A Professional Corporation
1925 Century Park East
Los Angeles, California
(310) 203-9393
Attorneys for Plaintiff

UNITED STATES BANKRUPTCY COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

In Re:	) Bk. No. LA 91-10097-BR
HERBERT HERMAN	) [Chapter 11]
WEISBERG and	)
DELPHINE RUTH	) Adv. No. LA 93-01419-BR
WEISBERG,	)
Debtor,	) [PROPOSED] ORDER
_____	) DENYING TRUSTEE'S
EDWARD M.	) MOTION TO ALTER OR
WOLKOWITZ,	) AMEND THE JUDGMENT
TRUSTEE,	) AND GRANTING
Plaintiff,	) SHEARSON'S MOTION
vs.	) FOR SANCTIONS AND
SHEARSON LEHMAN	) JUDGMENT THEREON
BROTHERS, INC.,	)
Defendant.	) DATE: January 4, 1994
	) TIME: 9:30 a.m.
_____	) PLACE: Courtroom 1668

TO: THE CLERK OF THE COURT, ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Edward M. Wolkowitz, Trustee's (hereinafter "Trustee") motion brought pursuant to Bankruptcy Rule 9023 and, by incorporation, Federal Rule of Civil Procedure 59, to alter or amend the summary judgment and order granting summary judgment in favor of defendant Shearson Lehman Brothers Inc. ("Shearson") came on for a regularly scheduled hearing before this court on January 4, 1994, the Honorable Barry Russell presiding. David R. Weinstein, Esq. of Weinstein, Eisen & Doherty, a Professional Corporation appeared on behalf of plaintiff. Stacey M. Garrett, Esq. and Jeffrey D. Warren, Esq. of Keesal, Young & Logan appeared on behalf of Shearson.

Having considered the Trustee's moving papers, Shearson's opposition, the Trustee's reply and oral. argument thereon, the court denied the Trustee's motion to alter or amend the judgment. Further, the court found that the Trustee's motion to alter or amend the judgment was not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law and that the Trustee's filing and prosecution of his motion to alter or amend the judgment violated Bankruptcy Rule 9011 and, by incorporation, Federal Rule of Civil Procedure 11. Accordingly, the court granted Shearson's motion for sanctions in the amount of $3,293.43,

the amount of its attorneys, fees and costs reasonably incurred opposing the motion to alter or amend the judgment.

IT IS H ERE BY ORDERED that the Trustee's motion to alter or amend the summary judgment in favor of Shearson and order granting Shearson's motion for summary judgment is denied.

IT IS FURTHER ORDERED that Shearson is hereby awarded sanctions in the amount of $3,293.43. Such sanctions are imposed jointly and severally on David R. Weinstein, Esq. and Edward M. Wolkowitz, Trustee.

The Clerk of the Court is hereby ordered to enter judgment in favor of Shearson and against David R. Weinstein, Esq. and Edward M. Wolkowitz, Trustee, jointly and severally, in the amount of $3,293.43.

Barry Russell
UNITED STATES
BANKRUPTCY JUDGE

(Filed: 2/8/94)

STEPHEN YOUNG #58711
JEFFREY D. WARREN #152421
STACEY MYERS GARRETT #155319
KEESAL, YOUNG & LOGAN
A Professional Corporation
Catalina Landing - 310 Golden Shore
Post Office Box 1730
Long Beach, California 90801-1730
Telephone: (310) 436-2000

Attorneys for Defendant
SHEARSON LEHMAN BROTHERS INC.

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re	) BK. NO. LA-91-10097-BR
HERBERT HERMAN	) [Chapter 11]
WEISBERG and	)
DELPHINE RUTH	)
WEISBERG,	) Adv. No. LA-91-01419-BR
Debtors.	)
_____	) [PROPOSED] ORDER
EDWARD M.	) GRANTING SHEARSON'S
WOLKOWITZ, Trustee,	) MOTION FOR SUMMARY

Plaintiff,	) JUDGMENT AND
v.	) DENYING TRUSTEE'S
SHEARSON LEHMAN	) CROSS-MOTION FOR
BROTHERS INC.,	) SUMMARY JUDGMENT
Defendant.	)
	) [F.R.C.P. 56; F.B.R.P.
	) 7056; Local B.R. 111]
	) DATE: Sept. 13, 1993
	) TIME: 9:30 a.m.
	) PLACE: Courtroom 1668,
	) Hon. Barry Russell
_____	)

THE CLERK OF THE COURT, ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

SHEARSON LEHMAN BROTHERS INC. (hereinafter referred to "Shearson") motion for summary judgment and for sanctions and EDWARD M. WOLKOWITZ's (hereinafter "Trustee") cross-motion for summary judgment came on regularly scheduled hearing before this Court on September 13, 1993, the Honorable Barry Russell presiding David Weinstein, Esq. and Jacqueline Dubin, Esq. of Weinstein, Eisen & Doherty appeared on behalf of plaintiff. Stacey M. Garrett, Esq. and Jeffrey D. Warren, Esq. of Keesal, Young & Logan appeared on behalf of Shearson.

Having considered all the evidence set forth in the papers submitted, and all the inferences which may

reasonably be made therefrom, except that to which objection was sustained, the Court determines that there is no triable issue as to any material fact and that defendant Shearson is entitled to judgment as a matter of law, for the following reasons:

1. Shearson, in support of its motion, established each element necessary to sustain judgment in its favor by proffering evidence as follows:

a. It is a stockbroker as defined by 11 U.S.C. § 101(54);

b. The debtor in this matter, HERBERT HERMAN WEISBERG ("Weisberg"), is a customer of Shearson as defined by 11 U.S.C. § 741(2);

c. The dispute in this matter is made in connection with a securities contract as defined by 11 U.S.C. § 741(7);

d. Shearson's liquidation of City National Corp. stock was a set off of Shearson's claim against Weisberg for margin payments as defined by 11 U.S.C. § 741(5); and

e. The margin payments arose out of a securities contract against securities held by Shearson to margin, guarantee, secure or settle a securities contract. Accordingly, pursuant to 11 U.S.C. § 362(b) (6), Shearson's liquidations of securities in Weisberg's account pursuant to duly issued margin calls did not violate the automatic stay imposed by 11 U.S.C. § 362(a);

f. The Trustee is not entitled to avoid the postpetition transfers of Weisberg's property to Shearson because the transfers were not wrongful;

g. The Trustee is not entitled to recover the "enhancements" in Weisberg's account because Shearson did not violate the automatic stay imposed by 11 U.S.C. § 362(a).

2. Plaintiff, in opposition to defendant's motion, proffered no evidence sufficient to raise a triable issue of fact. Further, plaintiff failed to produce adequate evidence or authority to support entry of summary judgment in his favor.

3. The parties resolved Shearson's motion for sanctions by negotiations off the record. Accordingly,

IT IS HEREBY ORDERED judgment be, and hereby is, granted in favor of Shearson and against the plaintiff with respect to each cause of action in plaintiff's complaint and that this adjudication shall be carried into any final judgment subsequently entered in this proceeding.

IT IS FURTHER ORDERED that plaintiff's cross-motion for summary judgment is denied with prejudice.

Dated: /s/ 9/28/93

Barry Russell

HONORABLE BARRY RUSSELL
U.S. BANKRUPTCY COURT

APPENDIX C

RELEVANT STATUTES

11 U.S.C. § 101(5).

In this title-

(5)"claim" means-

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 326.

(a) In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25 percent on the first $5,000 or less, 10 percent on any amount in excess of $5,000 but not in excess of $50,000, 5 percent on any amount in excess of $50,000 but not in excess of $1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of $1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest,

excluding the debtor, but including holders of secured claims.

(b) In a case under chapter 12 or 13 of this title, the court may not allow compensation for services or reimbursement of expenses of the United States trustee or of a standing trustee appointed under section 586(b) of title 28, but may allow reasonable compensation under section 330 of this title of a trustee appointed under section 1202(a) or 1302(a) of this title for the trustee's services, payable after the trustee renders such services, not to exceed five percent upon all payments under the plan.

(c) If more than one person serves as trustee in the case, the aggregate compensation of such persons for such service may not exceed the maximum compensation prescribed for a single trustee by subsection (a) or (b) of this section, as the case may be.

(d) The court may deny allowance of compensation for services or reimbursement of expenses of the trustee if the trustee failed to make diligent inquiry into facts that would permit denial of allowance under section 328(c) of this title or, with knowledge of such facts, employed a professional person under section 327 of this title.

11 U.S.C. § 330.

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103-

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3)(A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for --

(i) unnecessary duplication of services; or

(ii) services that were not --

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim

compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

(b)(1) There shall be paid from the filing fee in a case under chapter 7 of this title $45 to the trustee serving in such case, after such trustee's services are rendered.

(2) The Judicial Conference of the United States --

(A) shall prescribe additional fees of the same kind as prescribed under section 1914(b) of title 28; and

(B) may prescribe notice of appearance fees and fees charged against distributions in cases under this title;

to pay $15 to trustees serving in cases after such trustees' services are rendered. Beginning 1 year after the date of the enactment of the Bankruptcy Reform Act of 1994, such $15 shall be paid in addition to the amount paid under paragraph (1).

(c) Unless the court orders otherwise, in a case under chapter 12 or 13 of this title the compensation paid to the trustee serving in the case shall not be less than $5 per month from any distribution under the plan during the administration of

the plan.

(d) In a case in which the United States trustee serves as trustee, the compensation of the trustee under this section shall be paid to the clerk of the bankruptcy court and deposited by the clerk into the United States Trustee System Fund established by section 589a of title 28.

11 U.S.C. § 362(a).

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of --

(1) the commencement or continuation, including the issuance or employment of process, of a Judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise

control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

11 U.S.C. § 362(b)(6).

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay --

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or

in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

11 U.S.C. § 704.

The trustee shall --

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

(2) be accountable for all property received;

(3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine= proofs of claims

and object to the allowance of any claim that is improper;
(6) if advisable, oppose the discharge of the debtor;
(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;
(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and
(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

11 U.S.C. § 741(7).

In this subchapter --
(7) "securities contract" means contract for the purchase, sale, or loan of a security, including an option for the purchase or sale of a security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any option entered into on a national securities exchange relating to foreign currencies, or the guarantee of any settlement of cash or securities by or to a

securities clearing agency;

Federal Rule of Bankruptcy Procedure 9011 (former version).[1]

(a) Signature

Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a

---

[1]Effective December 1, 1997, Federal Rule of Bankruptcy Procedure 9011 was amended to conform with Federal Rule of Civil Procedure 11.

document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

(b) Verification

Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.

(c) Copies of signed or verified papers

When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

Federal Rule of Bankruptcy Procedure 9023.

Rule 59 F.R.Civ.P. applies in cases under the Code,

except as provided in Rule 3008.

Federal Rule of Civil Procedure 59.

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Court's Initiative; Notice; Specifying Grounds. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

No. 97-2053

In The

Supreme Court of the United States

October Term, 1997

In re HERBERT HERMAN WEISBERG
and DELPHINE RUTH WEISBERG,

Debtors,

EDWARD M. WOLKOWITZ, Trustee,

Petitioner,

vs.

SHEARSON LEHMAN BROTHERS, INC.,

Respondent,

DAVID R. WEINSTEIN,

Petitioner.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN P. BEVILACQUA
388 Greenwich Street
New York, New York 10013
(212) 816-7279

DAWN M. SCHOCK
Counsel of Record
STACEY M. GARRETT
KEESAL, YOUNG & LOGAN
A Professional Corporation
400 Oceangate
Post Office Box 1730
Long Beach, California 90801-1730
(562) 436-2000

Attorneys for Respondent

QUESTIONS PRESENTED

Should this Court examine the application of an unambiguous federal statute, 11 U.S.C. § 362(b)(6), to undisputed facts where:

(1) There is no conflict among the circuits or between the Ninth Circuit and the state court of last resort;

(2) The Ninth Circuit (and every lower court which considered the issue) expressly found that respondent did not violate the automatic stay at 11 U.S.C. § 362(a) when it sold securities respondent held in the debtor's margin securities account to meet duly issued margin maintenance calls;

(3) The Ninth Circuit properly affirmed the trial court's order denying petitioners' motion for leave to alter or amend the judgment where the proposed amendment reflected an event that did not occur?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

The following are parents of respondent SHEARSON LEHMAN BROTHERS, INC. ("Shearson"), now known as Salomon Smith Barney:

The Travelers Group.

Shearson does not have any nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Statement of the Case	1
A. Introduction	1
B. Factual Background	2
Reasons for Denying the Writ	2
I. The Petition Should Be Denied Because None Of The Grounds Listed In Rule 10 Exist.	2
II. The Petition Should Be Denied Because The Ninth Circuit Properly Decided The Issues Presented By This Case.	4
A. The Ninth Circuit Properly Concluded That The Client Agreement Is A "Securities Contract" And That The Loan To Weisberg Was "Margin Loan."	4
B. The Ninth Circuit Correctly Recognized That Congress Intended 11 U.S.C.§ 362(b)(6) To Apply To Situations Such As This.	7

Contents

Page

C. The Ninth Circuit Properly Affirmed the Trial Court's Order Denying Petitioners' Motion to Alter or Amend the Judgment. 8

Conclusion 9

TABLE OF CITATIONS

Cases Cited:

Harmsen v. Smith, 693 F.2d 932 (9th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983) 5

Mallis, et al. v. Federal Deposit Ins. Corp., 568 F.2d 824 (2d Cir. 1977) 5

Rubin v. United States, 449 U.S. 424 (1981) 6

School Dist. No. 1J, Multnomah County v. Acands, Inc., 5 F.3d 1255 (9th Cir. 1993) 8

United States v. Kendrick, 692 F.2d 1262 (9th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) 5

Wolkowitz v. Shearson Lehman Brothers, Inc. (In re Weisberg), 136 F.3d 655 (9th Cir. 1966) 3

Wolkowitz v Shearson Lehman Brothers, Inc. (In re Weisberg), 136 F.3d 655 (9th Cir. 1998) 7

Contents

Page

Statutes Cited:

11 U.S.C. § 362(a) ..... i, 1, 4

11 U.S.C. § 362(b)(6) ..... i, 1, 2, 3, 4, 7, 9

11 U.S.C. § 741(7) 5

28 U.S.C. § 158(a) 1

Rules Cited:

Local Bankruptcy Rule 116 of the Central District of California 8

Supreme Court Rule 10 ..... 2, 3

Other Authorities Cited:

12 C.F.R. § 220.2(b) 2

12 C.F.R. § 220.2(u) 2

12 C.F.R. § 220.9(b) 2, 6

Congressional Record, U.S. Senate, July 13, 1982, 97th Congress, 2nd Session, Vol. 128, Part 12, pp. 15980-15981 7

STATEMENT OF THE CASE

A. Introduction

This brief is filed on behalf of Shearson, defendants and appellees below.

This appeal arises out of Shearson's post-petition liquidation of securities in the margin account of the Chapter 11 debtor, Herbert Weisberg ("Weisberg") and use of the sale proceeds to make margin payments and set off Weisberg's $50,000 margin loan from Shearson.

The issues presented by this appeal are simple. Petitioners contend Shearson's actions violated the automatic stay, 11 U.S.C. § 362(a). Every lower court to consider the issue has found that Shearson's post-petition liquidation of securities to set off Weisberg's margin debt was expressly permitted by 11 U.S.C § 362(b)(6) and therefore did not violate the automatic stay.

This appeal also arises out of Petitioners' undying effort to seek appellate review of the terms of a voluntary settlement agreement. The Ninth Circuit properly found that it did not have jurisdiction to review the terms of the settlement agreement because it was not the subject of a final order, judgment or decree, as required by 28 U.S.C. § 158(a). The Ninth Circuit also properly affirmed the trial court's denial of Petitioners' motion to alter or amend the judgment where Petitioners sought to have the judgment reflect an event that did not occur. Petitioners sought to amend the judgment to reflect that the court imposed sanctions on them. The trial court did not, however, impose sanctions. Consequently, Petitioners' motion was properly denied.

Neither issue merits review by this Court. The statute at issue, 11 U.S.C. § 362(b)(6), is clear and unambiguous. The circuit courts are not in conflict on this issue; indeed, Petitioners concede that the Ninth Circuit is the only circuit court to apply the statute. The petition should be denied in its entirety.

B. Factual Background

The petition misstates the facts of this case. For instance, Petitioners presented no evidence to the trial court to establish, and indeed, the record is silent as to how Weisberg used the $50,000 in borrowed funds. Thus, Petitioner's assertion that Weisberg "borrowed the $50,000 from Shearson for purposes other than to purchase stock" (Petition at p. 4) is completely unsupported by any evidence in the record. In the absence of any evidence to the contrary, all credit extended by a securities broker is presumed to be "purpose credit" for the purpose of purchasing or maintaining securities. *See* 12 C.F.R. 220.2(b), (u); 220.9(b). As a result, much of Petitioners' arguments in the Petition are misdirected.

The opinion of the Ninth Circuit contains a concise and accurate recital of the factual and procedural background of the case. To the extent any further elucidation of the facts may be necessary in connection with a brief on the merits, Shearson will do so at that time.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE NONE OF THE GROUNDS LISTED IN RULE 10 EXIST.

The Rules of this Court provide that a petition for writ of certiorari will be granted only when there exist compelling

reasons, such as, when decisions of the United States Courts of Appeals are in conflict with one another or in conflict with a state court of last resort or when a United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. *Rules of the Supreme Court of the United States, Rule 10.* A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. *Id.*

Petitioners have failed to state why the issues in this case justify review by this Court. Petitioners do not contend that review is necessary to clarify a conflict among the United States Courts of Appeals or between a United States Court of Appeals and a state court of last resort. Indeed, Petitioners concede that the matter is one of "first impression" (Petition at p. 16). Both the Ninth Circuit and the Bankruptcy Appellate Panel for the Ninth Circuit ("BAP") noted that "there is scant legal precedent interpreting Section 362(b)(6)." *Wolkowitz v. Shearson Lehman Brothers, Inc. (In re Weisberg)*, 136 F.3d 655, 657, n.1 (9th Cir. 1966). Nor do Petitioners contend that either the Ninth Circuit or any of the lower courts to consider the case has so far deviated from the usual course of judicial proceedings to justify an exercise of the Supreme Court's power of supervision. Instead, Petitioners essentially argue that the petition should be granted because the trial court, the BAP and the Ninth Circuit all misapplied 11 U.S.C. § 362(b)(6) to the undisputed facts in this case. Even if Petitioners are correct (and Shearson contends they are not), Rule 10 specifically states that such an error does not merit review by this Court.

The petition should be denied.

II.

THE PETITION SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT PROPERLY DECIDED THE ISSUES PRESENTED BY THIS CASE.

Pursuant to 11 U.S.C. § 362(a), virtually all actions against debtor and his or her property are automatically stayed upon the filing of a bankruptcy petition. At issue in this case is Section 362(b)(6) which exempts from the automatic stay:

> the setoff by a . . . stockbroker . . . of any mutual debt and claim under or in connection with . . . securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment as defined in section 101(34), 741(5) or 761(15) of this title, arising out of securities contracts against cash, securities, or other property held by or due from such . . . stockbroker . . . to margin, guarantee, secure or settle . . . securities contracts.

11 U.S.C. § 362(b)(6).

The Ninth Circuit correctly found that this case met all of the requirements of 11 U.S.C. § 362(b)(6), which permitted Shearson to liquidate securities in Weisberg's margin account for the purpose of making margin payments without violating the automatic stay.

A. The Ninth Circuit Properly Concluded That The Client Agreement Is A "Securities Contract" And That The Loan To Weisberg Was A "Margin Loan."

Petitioners contend that the Ninth Circuit erred in finding that the Client Agreement was a "securities contract," and that it

further erred in finding that Weisberg's loan was a "margin loan. Petitioners are wrong.

Title 11, section 741(7) defines a "securities contract" as a contract:

> [F]or the purchase, sale or loan of a security . . . or the guarantee of any settlement of cash or securities by or to a securities clearing agency.

The language in the Client Agreement makes it clear that Weisberg and Shearson entered into an express contract for the purpose of purchasing or selling securities or borrowing against the value of securities. In fact, the entirety of the Client Agreement relates to the purchase, sale and borrowing of securities.

Moreover, securities were sold and purchased in Weisberg's account. On 15 occasions (all of which occurred post-petition and 13 of which occurred after the Trustee was appointed), Shearson sold shares of Weisberg's securities to obtain cash with which to make margin payments and set off Weisberg's margin loan. The Ninth Circuit also found that Weisberg's use of his securities as collateral for his margin loan also constituted a "purchase" of securities in his Shearson account. The Ninth Circuit has held that a pledge of securities to secure a margin brokerage account constitutes a "purchase and sale" for the purpose of satisfying the "purchase and sale" requirement of a securities fraud action under the Securities Exchange Act, § 10(b) and Rule 10b-5. *United States v. Kendrick*, 692 F.2d 1262, 1265 (9th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983). *See also Harmsen v. Smith*, 693 F.2d 932, 947 (9th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983) and *Mallis, et al. v. Federal Deposit Ins. Corp.*, 568 F.2d 824, 828 (2d Cir. 1977). The United States Supreme Court also has held that a pledge of

stock to secure a margin brokerage account constitutes a "sale" for purposes of Section 2(3) of the Securities Act of 1933. *Rubin v. United States*, 449 U.S. 424 (1981).

Nevertheless, Petitioners contend that because Weisberg owned the stock first and then borrowed the $50,000 from Shearson (using the stock as collateral), the loan is not a "margin loan." Petitioners' argument ignores both the evidence in this case and the effect of the legal presumption contained Regulation T enacted by the Federal Reserve Board. Regulation T presumes that all credit extended by a brokerage is "purpose credit," or credit used to purchase, sell or carry securities. 12 C.F.R. § 220.9(b). This presumption can be overcome only if prior to extending the credit, the brokerage firm accepts in good faith from the customer a written statement that the credit is not "purpose credit." *Id.*

In this case, Weisberg did not provide Shearson with a written statement stating that the loan he obtained was not "purpose credit." Accordingly, the loan obtained is irrefutably presumed to be for the purpose of purchasing, selling or carrying securities, and the Ninth Circuit properly found that the loan was a "margin loan." In doing so, the Ninth Circuit soundly rejected Petitioners' argument on this point. The Ninth Circuit stated:

> That the securities in Weisberg's margin account were pledged as collateral for a loan is irrelevant. The Client Agreement authorized Shearson to sell Weisberg's securities in the event Weisberg failed to meet a margin call, and therefore constituted in effect a securities agreement. The trustee cannot obviate the true nature of Weisberg's financial relationship with Shearson by characterizing the transaction as a simple loan transaction.

Wolkowitz v Shearson Lehman Brothers, Inc. (In re Weisberg), 136 F.3d 655, 659 (9th Cir. 1998). The reasoning of the Ninth Circuit is correct. Petitioners' argument to the contrary should be ignored.

B. The Ninth Circuit Correctly Recognized That Congress Intended 11 U.S.C.§ 362(b)(6) To Apply To Situations Such As This.

The Ninth Circuit recognized that the legislative history of § 362(b)(6) illuminates the harm Congress intended to avoid by providing the exception. The Ninth Circuit quoted Senator Robert Dole's comments in the Senate Administrative Record:

> It is essential that stockbrokers and securities clearing agencies be protected from the issuance of a court or administrative order which would stay the prompt liquidation of an insolvent's positions, because market fluctuations in the securities markets create an inordinate risk that the insolvency of one party could trigger a chain reaction of insolvencies of the others who carry accounts for that party and undermine the integrity of those markets.

Wolkowitz v. Shearson Lehman Brothers, Inc. (In re Weisberg), 136 F.3d 655, 659 (9th Cir. 1998) (Citing Congressional Record, U.S. Senate, July 13, 1982, 97th Congress, 2nd Session, Vol. 128, Part 12, pp. 15980-15981).

The Ninth Circuit properly concluded that 11 U.S.C. § 362(b)(6) was designed to permit Shearson's actions in the instant case. In fact, as the Ninth Circuit expressly stated, "This is the type of fluid market transactions Congress contemplated when it enacted Section 362(b)(6)." *Wolkowitz v. Shearson Lehman Brothers, Inc. (In re Weisberg)*, 136 F.3d 655, 659 (9th Cir. 1998).

C. The Ninth Circuit Properly Affirmed the Trial Court's Order Denying Petitioners' Motion to Alter or Amend the Judgment.

A motion to alter or amend a judgment is proper where there has been: (1) a manifest disregard of the law by the court; (2) significant newly discovered evidence which was not discoverable at the time of the hearing; or (3) a change in controlling law. *School Dist. No. 1J, Multnomah County v. Acands, Inc.*, 5 F.3d 1255 (9th Cir. 1993). The Ninth Circuit properly affirmed the trial court's denial of Petitioners' motion to alter or amend because it did not seek to correct a manifest error of law or fact or to present newly discovered evidence. Moreover, Petitioners' motion was properly denied because it sought to amend the judgment to reflect the occurrence of an event (imposition of sanctions) that did not occur, and because Petitioners waived any objection to the content or form of the judgment entered in favor of Shearson. *See* Local Bankruptcy Rule 116 of the Central District of California.

CONCLUSION

Petitioners have failed to establish any reason why their petition should be granted and have further failed to demonstrate any error by the Ninth Circuit. The Ninth Circuit Court of Appeals correctly applied 11 U.S.C. § 362(b)(6) in this case. The petition should be denied in its entirety.

Respectfully submitted,

DAWN M. SCHOCK
Counsel of Record
STACEY M. GARRETT
KEESAL, YOUNG & LOGAN
A Professional Corporation
400 Oceangate
Post Office Box 1730
Long Beach, California 90801-1730
(562) 436-2000

JOHN P. BEVILACQUA
388 Greenwich Street
New York, New York 10013
(212) 816-7279

Attorneys for Respondent